LECTURES

ON

JURISPRUDENCE.

BEING THE SEQUEL TO

"THE PROVINCE OF JURISPRUDENCE DETERMINED."

TO WHICH ARE ADDED

NOTES AND FRAGMENTS

Now first published from the Original Manuscripts.

BY THE LATE

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LECTURES ON JURISPRUDENCE.

LECTURE XLVIII.

In my last lecture, I proceeded to the first of the two capital departments under which I arrange or distribute the matter of the Law of Things, (or the matter of the bulk or mass of the legal system): namely, primary rights, with their corresponding primary duties.

Adverting to primary rights, (or to rights which are not consequences of delicts or injuries,) I proceeded, in the first instance, to rights *in rem* (or rights availing against the world at large) as existing *per se* or simply: that is to say, as not combined with rights *in personam*, or rights availing exclusively against specifically determined persons.

Adverting to rights *in rem*, as existing *per se* or simply, I first considered them with reference to differences between their respective *subjects*: or (changing the expression) with reference to differences between the aspects of the forbearances which may be styled their objects. I touched upon the rights of the class of which the subjects are *things*, or of which the objects are such forbearances as regard determinately specifically determined things. I noticed the rights of the class of which the subjects are *persons*, or of which the objects are such forbearances as regard determinately, specifically determined persons. And I adverted to

the rights of the class which have *no* specific subjects, or of which the objects are such forbearances as have no specific regard to specific things or persons.

Dismissing the rights of the class of which the subjects are *persons*, and also the rights of the class which have *no* specific subjects, I proceeded to such distinctions between rights of the class over *things* as are founded on differences between the degrees wherein the entitled persons may use or deal with the subjects.

I adverted generally to that leading distinction of the class which may be marked with the opposed expressions *dominion*, *property* or *ownership*, and *servitude* or *easement*. And to obviate some of the difficulties which arise from the ambiguities of the expression, I stated some eight or ten of the many and disparate meanings, which, in popular language, and even in the writings of lawyers, are annexed to the term *property* and the term *dominion*.

Distinction between dominion or property and *servitus* or easement.

Pursuing my examination of the distinction, which, for want of better names, I marked with the opposed expressions to which I have now adverted, I would remark that I mean by *property* (as opposed to *servitus* or easement) any right which gives to the entitled party an indefinite power or liberty of using or disposing of the subject: or (in other words) which gives to the entitled party such a power or liberty of using or disposing of the subject as is not capable of exact circumscription; as is merely limited generally by the rights of all other persons, and by the duties (relative or absolute) incumbent on himself.

And by *servitus* or *easement* (as opposed to *property* or *dominion*) I mean any right which gives to the entitled party such a power or liberty of using or disposing of the subject as is defined or circumscribed exactly.

An estate in fee simple in land, absolute property in a personal chattel, or an estate or interest for life or years in

land or a personal chattel, are all of them cases of *property* or *dominion* (taking the expression in the sense which I am now giving to it).

A right of way through land belonging to another, a right of common (or of feeding one's cattle on land belonging to another,) or a right to tithe (or to a definite share in the produce of land belonging to another,) are all of them cases of *servitus* or *easement* (as I now understand the expression).

In the former cases, the party may apply the subject to any purpose or use which does not amount to a violation of any right in another, or to a breach of any duty lying on himself. And it is only in that negative manner that the purposes to which he may apply it can be determined.

In the latter cases, the party may apply it to purposes, or may derive from it uses, which are not only limited generally by the duties incumbent upon him, but which are determined (or capable of determination) by a positive and complete description.

In a word, *servitus* or easement gives to the entitled party, a power or liberty of applying the subject to exactly determined purposes. Property or dominion gives to the entitled party, the power or liberty of applying it to *all* purposes, *save* such purposes as are not consistent with his relative or absolute duties.

I would briefly remark (before I proceed) that in treating of the distinction now in question, I suppose that the right of the party is present or vested, and is also accompanied with a right to the present enjoyment of the right, or to the present exercise of it. To the nature of contingent rights, and of such vested rights as are not coupled with a right to present enjoyment or exercise, I shall advert hereafter.

Property is susceptible of various *modes.*

Property or dominion (used with the meaning which I am now annexing to the term) is appli-

cable to any right which gives to the entitled party an indefinite power or liberty of using or dealing with the subject. But property (as thus understood) is susceptible of various *modes:* that is to say, the limitations or restrictions to that power or liberty, which spring from the rights of others and from the duties incumbent on himself, may vary to infinity.

For example: A right of unlimited duration (as an estate in fee-simple in land, or absolute property in a personal chattel) and a right of limited duration (as an estate for life or years in land or a personal chattel) are equally *property* (in the present sense of the expression): for, in either case, the power or liberty of user which resides in the entitled party, is not susceptible of positive and exact circumscription.

But the limitations or restrictions to that indefinite right of user, are, in the different cases, widely different.

In the case of the estate in fee, or the absolute property in the personal chattel, the owner may waste or destroy the subject, in so far as such waste or destruction may not be injurious to other persons considered generally.

In the case of the estate for life, or of the estate for years, this power or liberty is restrained, not only by the rights of others considered generally, but by the rights in the same subject of those in remainder or reversion: that is to say, who have rights in the same subject, subsequent to the rights of the owner for life or the owner for years. For if the owner for life, or the owner for years, had the same power of user which resides in the absolute owner, it is clear that the rights of those who are in remainder or reversion would be merely illusory. In respect of *their* rights, he, at least, must be subject to the duty of not destroying the subject, or of so dealing with it as would render it absolutely worthless. *

But the restrictions to the right of the limited owner,

* Blackstone, vol. ii. pp. 122, 280, 381, 397; vol. iii. pp. 223, 243.

which arise from the rights of the remainderman or reversioner, may also be fixed differently by the absolute dispositions of the law, or by private dispositions which the law allows and protects. We may suppose, for example, that the owner for life of land may be empowered to divest it completely of timber and buildings, and to leave nothing to his followers but the bare soil: Or that his power of taking timber, and demolishing buildings, may be more or less restricted.

In our own law, in the Roman and French law, and (no doubt) in every other system, the power of user which is annexed to limited interests, is restricted (in regard to the interests of the following takers) in a great variety of ways.

Property pre-eminently so called: viz. which is accompanied with the largest power of user, and therefore with a power of aliening from contingent successors.

But though the possible *modes* of property are infinite, and though the indefinite power of user is always restricted more or less, there is in every system of law, some one mode of property in which the restrictions to the power of user are fewer than in others: Or (changing the expression) there is some one mode of property in which the power or liberty of indefinite user is more extensive than in others. And to this mode of property, the term dominion, property, or ownership is pre-eminently applied.

Such, for example, in the Roman law, is *dominion* (in the strict sense): such, in the French law, is *propriété* (in the same sense): such, in our own law, is absolute property in a moveable. Such, too, in our own law, is an estate in fee-simple in land: but which (although it is closely analogous to absolute property in a moveable) is not commonly called property or ownership.

The right of property pre-eminently so called (or the mode of the right of property which is coupled with the largest power of user) is (for the reasons to which I have just adverted) a right of unlimited duration: that is to say,

there is no person having any interest in the subject subsequent to his own, from whom the owner may not divert it by a total or partial alienation. Let the contingent successors be who they may, (whether they succeed by private and particular dispositions, or by general dispositions of the law taking effect in default of particular dispositions,) they have no such right in the subject as the owner may not defeat, and as sets a restriction or limitation to his power of using the subject.

This I apprehend (speaking generally) is the notion of property unlimited in duration, and therefore the most extensive of any in respect of the power of user. In strictness, it is not a right of unlimited duration: for no right can endure longer than the life of the party entitled. But it implies a power of aliening the right itself, from the successors who would take it (by particular disposition, or by the general disposition of the law) in case the owner died without alienation.

To this I shall advert particularly, when I come to consider rights in regard to their respective durations.

Property pre-eminently so called, is not unlimited in respect of the power of user.

Even the right of property pre-eminently so-called (or the right of property whose duration is unlimited) is not unlimited in respect of the power of user which resides in the proprietor. The right of user (with the implied or corresponding right of excluding others from user) is restricted to such a user, as shall be consistent with the rights of others generally, and with the duties incumbent on the owner.

For example: I may exclude others generally from my own land or house: but I cannot exclude officers of justice, who, authorized by a warrant or other due authority, come to my house to search for stolen goods. If I am the absolute owner of my house, I may destroy it if I will. But I must not destroy it in such a manner as would amount to an injury to any of my neighbours. If, for example, I live in a town, I may not destroy it by fire, or blow it up by gunpowder.

I have a right in my own person which is analogous to the right of property in a determinate thing. And, as a consequence of that right, I may (generally speaking) move from place to place. But this my liberty and right of locomotion, does not empower me to enter the land or house of another, unless I am specially authorized by the owner's license, by a right of way through his house or land, or by some other cause specially empowering me to enter it.

And the power of user which is implied by the right of property, may also be limited by duties which are incumbent on the owner specially and accidentally.

For example: The power of user may be restricted by duties or incapacities which attach upon the owner in consequence of his occupying some *status* or condition. We may conceive, for example, that an infant proprietor is restricted (by reason of his infancy) in respect of the power of using, as well as the power of aliening.

Or the power of user may be restricted by reason of a concurrent right of property residing in another over the same subject. [*Condominium—Miteigenthum*—Joint property—or property in common.]

Or the power of user may be restricted by virtue of a right of servitude residing concurrently over the same subject in another person. For example: I have (speaking generally) a right of excluding others from my own field. But I have not a right of excluding you (exercising your servitude or easement), if you have a right of way (by grant or prescription) over the subject of my right of property. I have (speaking generally) a right to the produce of the field: but that right is limited by a right in the parson to a tithe, unless my land be tithe free.

Property preeminently so called, or any of its modes, cannot be defined (in respect of the power of user) exactly.

It follows from what has preceded, that neither that right of property which imports the largest power of user, nor any of the rights of property which are modes or modifications of that, can be defined exactly. For property or dominion, *ex*

vi termini, is *jus in rem* importing an indefinite power of user: *i.e.* such a power of using or of dealing with the subject as is limited by nothing but the duties incumbent on the owner: or a power of applying the subject to any purpose whatever which does not conflict with any duty to which the owner is subject. This indefiniteness is of the very essence of the right; and implies that the right (in so far as concerns the power of user) cannot be determined by exact and positive circumscription. Such an application of the subject as consists with every of his duties, the owner has a right to make: And any act, by another, preventing or hindering any application of the kind, is an offence against his right.

The definition therefore of the right lies throughout the *corpus juris*, and imports a definition of every right or duty which the *corpus juris* contains.

The modes of property are distinguishable from one another by precise lines of demarcation.

But though absolute property, or any of its modes, is not capable of exact circumscription, the various modes are distinguishable from one another by precise lines of demarcation.

For example: The right of owner for life, or of owner for years, may be distinguished from the right of the absolute owner, by an enumeration of the powers of user (belonging to the absolute owner) from which the owner for life or years is excluded.

And this (I apprehend) is the way in which these modes of absolute property are distinguished from absolute property itself and from one another. Such or such a use, for example, which the absolute owner may lawfully derive from the subject, would be, in the owner for life or the owner for years, an injury to the remainderman or reversioner.

The definitions (or no definitions) of property, in various codes or systematic treaties.

What I have said with regard to the definition of absolute property quadrates with the practice of law writers or makers of codes.

In the Institutes of Gaius and Justinian, the

right of property or dominion is not defined at all.* Things are described; the modes of acquiring property in them are described; servitudes are described; but of the right of property or dominion no direct description is given. The nature of the right (in respect of the power of user) is left to be inferred from the treatise generally. In the codes or treatises which attempt a definition of it, merely a few of its properties or qualities are given; and those properties or qualities are given with restrictions which lie throughout the body of the law.

The distinction between legal and equitable property (or *dominium ex jure quiritium* and *dominium bonitarium*), is a mere accident arising from the existence of the accidental distinction between *law* and *equity*, or *jus civile* and *jus prætorium*.†

Inquirenda: 1° How to ascertain (if that be possible) the services or uses which *may* be exacted or derived from the subject: 2° How to ascertain the services or uses which may *not* be derived from the subject, out of regard for rights residing in others, or absolute obligations upon self.

The extent of the right in respect of services seems not to be definable; although an enumeration of them may be made coextensively with (1°) the acts which have been held to be unlawful obstructions or withholdings of such services; (2°) with the acts which have been held to be a lawful dealing with the subject, or lawful perception of such services.—(See *Blackstone*, vol. iii. p. 120.)

The exceptions out of the indefinite services over which (as above) the right extends, consist in such uses of the subject as would amount to violations of a similar or another right in others, or of absolute obligations on one's self. In defining a right, care must therefore be taken not to make it inconsistent

* Institutes, 22. a. Gaius, p. 91.

† [For *dominium ex jure quiritium* and *dominium bonitarium*, see Hugo's History, pp. 167, 478, 501, 844. Savigny's *Recht des Besitzes*, pp. 86, 96, 176. Gaius, p. 102.]

with a right intended to be given to another, etc. (Use of interpretation here.)

Property, as here considered, is property existing in its widest extent; unlimited in respect of services, by any right to or over the same subject in another; and limited only by rights of others over or to other subjects, or by absolute obligations on self.

A right limited by rights of others over the same subject, (as *dominium* affected by *servitus*; *condominium*, whether in property or *servitus*), though involving fewer services and subject perhaps to fewer violations, is, nevertheless more difficult to explain.

The *attempts to solve these difficulties*, which one meets with in ordinary law books, are merely identical propositions and amount to nothing: *e. g.* "*Qui jure suo utitur neminem lædit.*"* If by *lædit* be meant damage or evil, it is false (and inconsistent with what immediately precedes); since the exercise of a right is often accompanied with the infliction of positive evil in another; and where others are excluded from the subject, supposes a pain of privation inflicted on others. If by *lædit* be meant *injury*, the proposition amounts to this; that the exercise of a right cannot amount to a wrong: which is purely identical and tells us nothing; since the thing we want to know is, "what is right? (or what is that which I may do without wrong?); and what is wrong? (what is that which would not be an exercise of my own right, inasmuch as it would amount to a violation of a right in another?)"

The same observations are applicable to "*sic utere tuo ut alienum non lædas.*"

The definition of those rights which are definite in respect of services, and exist over the same subject, is one means of limiting or defining those rights which are indefinite: Since acts (of user, exclusion, etc.) inconsistent with the former set of rights, are all of them knowable; and are, therefore, so many knowable uses to which the indefinite rights do *not* extend. But accurately to assign *that* limit to these last *which* is presented by the rights of others over other subjects or by the absolute obligations of the owner (where such rights or obligations are themselves indefinite) seems to be impossible: And even if all the rights and ob-

* Dig. cited by Mackeldey, vol. ii. p. 66.

ligations which limit were themselves defined, a complete statement of the definition would involve a repetition of the whole code.

Wahres Eigenthum ist nur möglich an körperlichen Sachen. Allein im römischen Rechte ist der Begriff von Eigenthum auch ausgedehnt auf *jura in re* insofern sie uns als eigene Rechte an einer fremden Sache zustehen: daher, *dominium, ususfructus et servitus.* Im weitesten Sinne, begreift Eigenthum *alles was zu unserm Vermögen gehört,* also auch Forderungen.—Mackeldey, *Lehrbuch des heut. röm. Rechts,* vol. ii. p. 36.

Community of Goods.

Community of goods is nothing but property in common; *i. e.* a right in the whole over the subject, with a right in each to a certain share in the produce: A right which must depend upon certain conditions; as, *e. g.* contributing to the product by a due portion of exertion.

Or supposing the right absolute, then the labour must be enforced by punishment.

The necessity of this is derived from two considerations; 1st, that good things can only be procured by labour. 2ndly, that the product of them is limited in amount. At the best, there is not enough for all; *i. e.* enough to satisfy all the desires of all.

From either of these the necessity of one of the schemes I have mentioned arises.

But even supposing that by training and by the advantages of combination, the labour might be lessened, the amount increased, and the desires limited, this can never be carried so far as to render all law unnecessary.

But the whole is a speculation.

Blackstone, vol. i. p. 138; vol. ii. p. 389. He does not define an estate in fee, in respect of power of user. That is to be collected from his whole treatise.

LECTURE XLIX.

In my last lecture, I considered particularly *property* or *dominion* (as opposed to *servitus* or *easement*). In my present lecture, I shall consider particularly *servitus* or easement (as opposed to property or dominion).

As I stated in my last lecture, I mean by *property* or *dominion* (taken with the sense wherein I use the term, for the present,) any such right *in rem* (of limited or unlimited duration) as gives to the party in whom it resides an indefinite power or liberty of using or dealing with the subject: A power or liberty of using or dealing with the subject, which is not capable of exact circumscription or definition; which is merely limited, generally and indefinitely, by the sum of the duties (relative and absolute) incumbent on the owner or proprietor.

As I also stated in my last lecture, property or dominion (as thus understood) is susceptible of various *modes*: or (in other words) the indefinite power of user, which is of the essence of all property, is susceptible of various degrees of restriction. But whatever be the extent of the power of user, (and of the power of exclusion, which the power of user implies,) it is not capable of exact circumscription, or of any more exact circumscription than that which I now have indicated.

By *servitus* or *easement* (taken with the sense which I give to the expression) I mean any such right *in rem* (or any such right availing against the world at large) as gives to the party in whom it resides a power of using the sub-

ject which is definite as well as limited. The power of using the subject (like that which is imported by the right of property) is limited by the sum of the duties which are incumbent on the party. But, unlike the power of user which is imported by the right of property, it is not *merely* circumscribed by the sum of his duties. The uses which he may derive from the subject, or the purposes to which he may apply it, are defined positively, or are susceptible of positive description.

In short, the difference between property (in any of its modes) and of *servitus* (whatever be its class) would seem to be this:—The party invested with a right of *servitus*, may turn or apply the subject to a *given* purpose or purposes. The party invested with a right of property, may turn or apply the subject to *all* purposes whatsoever, *save* such purposes as are not consistent with any of his duties (relative or absolute).

As I remarked in my last lecture, it is by reason of his *indefinite* power of user, that the subject of the owner's right is styled *his own*, or *res propria*: that his right is styled *property*, *ownership*, or *dominion*: that he is said to be the *owner* or *proprietor* of the subject, or is styled its *lord* or *master*. For (as I then remarked) there is no mode of property (not even that which is pre-eminently so called, and which implies the largest power of user and exclusion) which gives a power of user completely unlimited, and a consequent power of exclusion which is completely without restrictions.

Before I consider particularly the nature and kinds of servitudes, I must interpose the following brief remarks.

Speaking generally, a right of servitude is a fraction of a right of property residing in another or others. But a

1st. Speaking generally, the subject of a right of servitude is also at the same time the subject of property residing in another or others. For example, if I have a right of way over a field, the field is yours solely, or is yours jointly or in com-

right of servitude may exist over a subject which has not an owner properly so called.

mon with others, or is yours for life or years (solely or jointly with others) with rights of property in others expectant on the determination of that your limited interest.

For this reason,* rights of servitude are styled by the Roman lawyers *jura in re alienâ:* that is to say, rights over subjects of which the property or dominion resides in another or others. Though (as I shall show at the close of my lecture) rights of servitude are not the only rights to which the expression *jus in re alienâ* (or, briefly, *jus in re*) is aptly or actually applied.

For the same reason, a right of servitude is styled by Mr. Bentham a *fractional* right:† that is to say, a definite right of user, subtracted or broken off from the indefinite right of user which resides in him or them who bear the dominion of the subject. For the same reason, a right of servitude is styled by Von Savigny‡ (in his matchless treatise on the Right of Possession) a single or particular *exception* (accruing to the benefit of the party in whom the right resides) from the power of user and exclusion which resides in the owner of the thing.

Primary rights, etc. Rights *in rem, per se*.

For the same reason, rights of servitude are styled by French writers,‖ "*démembremens* du droit de propriété:" that is to say, detached bits or fractions of the indefinite right of user which resides in him or them who own the subject of the servitude. But (as I shall show at the close of my lecture) we may conceive a right of servitude existing over a thing, which speaking with precision, has no owner. We may conceive, for example, that the sovereign or state reserves to itself a portion of the national territory; but that it grants to

* Von Savigny, Recht des Besitzes, pp. 97, 166. See Table II., Note 4 (*post*). Mackeldey, vol. ii. p. 6.

† Traités de Législation, vol. i. p. 251.

‡ Recht des Besitzes, pp. 525, 534.

‖ Code Civil expliqué, by Rogron, vol. i. p. 241.

one of its subjects, over a portion of the territory so reserved, a right which quadrates exactly with the notion of a right of servitude: that is to say, a right to use or apply the subject in a definite manner.

Now, in the case imagined, there is not, properly speaking, any right of property in the thing which is subjected to the servitude. For, it is only by analogy, that we can ascribe to the Sovereign a legal right. Strictly speaking, the party has a right of servitude over a thing, the indefinite power of using which, the Sovereign or state has reserved to itself.

But since most rights of servitude imply rights of ownership, and cannot be explained without reference to those rights of ownership, I shall assume for the present, that every right of servitude is *jus in re alienâ:* is a definite fraction, or *démembrement*, of property or dominion, in the given subject, which resides in another or others.

2ndly. I showed, in my last lecture, that the modes of property (as *I* understand the expression) are infinite: and that to some of those modes, we cannot apply the expression, without a departure from established usage. For example: A right unlimited in respect of user, and also unlimited in respect of duration, is styled property or dominion: and, indeed, is *the* right to which the name is pre-eminently given. In our own law language, a right indefinite in point of user, though limited in point of duration, is also esteemed and called property, provided the limited duration be not exactly defined. Thus: we should call the right of tenant for life in an immoveable thing, *property* or *a right of property*. But a right indefinite in point of user, is not, in our own law language, styled *property*, in case the right be of limited duration, and the duration be exactly defined. Thus: The right of tenant for years, under a lease of a house or farm, is not called property, although his right is *jus in rem*, and gives him an indefinite power of using or

Difficulties encumbering the terms "property," "servitus," and "easement."

dealing with the subject. We should say of a life interest in an immoveable, or a personal chattel, that the party has an estate (or a right of *property*) with remainder or reversion over to another or others. We should also say of the interest of a lessee for years, that he has an *estate* for years, with reversion over to another.

But we should not style his interest *property* or *ownership*, although his power of user were not more limited than that of a tenant for life, and though the duration of his interest were incomparably longer than that of tenant for his own or for the life of another.

[Perhaps the interest of tenant for years (like that of the Roman *conductor*, etc.) was not originally *jus in rem*, but merely gave him a right to the enjoyment against the Lessor.]

Various other difficulties, which encumber the term "property," I stated in the lecture before the last.—I will merely add, at present, that I mean by the term property (as contradistinguished to *servitus*) any right *in rem* (of any duration whatever) which gives to the entitled party an indefinite power of user. For I am not considering rights with reference to their various durations, but with reference to the powers of user which they variously import. Though (as I showed in my last lecture) the power of user (in cases of property) is so modified by the extent of duration, that it is impossible to consider rights of property from the former of the two aspects, without considering them, to some degree, from the latter also.

The term *servitus* is not less encumbered with difficulties than the term property.

For, first, there are many rights (as I shall show presently) which, in the language of the Roman Law, and of the modern systems principally derived from it, are styled *servitudes:* but which, in the language of the English, would be styled *rights of property*. And, justly; for they are rights importing an indefinite power of user, although

they are not rights of unlimited duration: that is to say, empowering the party to alien the subject from those who *would* succeed to him in default of such alienation.

To these improper servitudes I shall advert more fully hereafter. And I now merely add, that I mean, for the present, by *a right of servitude* (as opposed to *a right of property*) any such right in a subject owned by another or others as gives to the party a *definite* power of using it.

The term *easement* is not less objectionable than the term *servitus*. For though it is never extended to any such rights *in rem* as fall properly within the category of *property*, it is *not applied* to certain rights *in rem* which fall properly within the category of *servitudes*. For example: A right of way over another's field is styled an easement. A right of common is also styled an easement. But a right to predial tithes (or to a definite portion in the produce of another's land) is never (I think) styled an easement: although it is called a *servitude* (or by a name of similar import) in the language of the legal systems which have borrowed largely from the Roman.

It may be a question, whether the term easement is limited to easements appurtenant. I think not. But, whatever may be the usual import of the term easement, (and it has not, I think, any settled import) I venture to use it with the sense in which I employ the term *servitude*: as meaning *any* right (definite in point of user) *over* a subject which is *res aliena*.

Quere, whether a *negative* servitude be a right of *using* the subject? And whether it be not merely *jus in personam* against the owner or occupant?

3rdly. For the sake of simplicity, I have assumed in my Outline, and also in my last and present lectures, that every right of servitude is a right of *using* a subject owned by another or others. But, as I shall show immediately, there are certain servitudes, which, in the language of modern civilians, are called *negative*; and which, in the language of the Roman Lawyers, are said to consist

non faciendo: that is to say, not to consist of a right to *use positively* the given subject, but in a right to a *forbearance* (on the part of the owner) from putting the given subject to a given use.

Now, whether a negative servitude be really a right of user, or whether it be a servitude at all (and be not rather a mere right *in personam*,) are questions, which, I frankly confess, I have not been able to solve to my own satisfaction.—I shall, however, discuss the subject immediately: And I merely advert to it, in this preliminary manner, in order that I may prepare you for a discrepancy between the definition of a servitude which I have hitherto given, and that analysis of servitudes to which I now proceed.

Order wherein the nature and kinds of servitudes will be considered.

Attempting to analyse the nature of servitudes, and to mark the chief kinds into which they are divisible, I shall address myself to the following principal (and to various subordinate) topics.

1st, the distinction between the servitudes which are styled by modern Civilians *affirmative* or *positive*, and the servitudes which are styled by the same Civilians *negative*: that is to say, those which consist in a right to *use* in a given manner the given subject, and those which consist in a right to a *forbearance* (on the part of the owner) from putting the given subject to a given use.

2ndly. I shall then examine the celebrated position, that no right of servitude is a right to an *act* on the part of the owner: that every right of servitude is a right to *use* the subject, or a right to a *forbearance* (on the part of the owner) from using the subject.

3rdly. I shall examine the distinction between *real* servitudes and *personal* servitudes: or (adopting to a certain extent the language of the English law) between servitudes *appurtenant* and servitudes *in gross*.

4thly. I shall examine the rights of property or dominion (meaning by *property* or *dominion*, any right *in rem* import-

ing an indefinite power of user) which, in the Roman Law, are ranked improperly (as I conceive) with rights of servitude.—It is of no small importance, that this confusion of disparate objects should be pointed out and cleared up. Without such a previous explanation, a great portion of the Roman Law, and of the modern systems which have borrowed its terms and classifications, are to an English lawyer inexpressibly perplexing. *Ususfructus, usus, habitatio, superficies, emphyteusis*, and, perhaps, other rights, which, in the language of the Roman law, are frequently styled *servitudes*, would be deemed (and I think justly) by English lawyers, rights of property for the life of the owner, or rights of property nearly approaching (in principle) to an estate in fee-simple, or absolute property in a personal chattel.

Distinction between *affirmative* or *positive*, and *negative* servitudes.

In pursuance of the order which I have now indicated, I begin with the established division of rights of servitude into *positive* or *affirmative* servitudes, and *negative* servitudes.

As I remarked in my last lecture, the right of property or dominion (in so far as the right of user is concerned) is resolvable into two elements: 1st, the power of using indefinitely the subject of the right, or of applying the subject of the right to uses or purposes which are not positively and exactly circumscribed: 2ndly, a power of excluding others (a power which is also indefinite) from using the same subject. For a power of indefinite user would be utterly nugatory, unless it were coupled with a corresponding power of excluding others generally from any participation in the use.

The power of user and the power of exclusion are equally rights to *forbearances* on the part of other persons generally. By virtue of the right or power of indefinitely using the subject, other persons generally are bound to forbear from disturbing the owner in acts of user. By virtue of the right or power of excluding other persons generally, other persons generally are bound to forbear from using or

meddling with the subject. The rights of user and exclusion are so blended, that an offence against the one is commonly an offence against the other. I can hardly prevent you from ploughing your field, or from raising a building upon it, without committing, at the same time, a trespass. And an attempt on my part to use the subject (as an attempt, for example, to fish in your pond) is an interference with your right of user as well as with your right of exclusion. But an offence against one of these rights is not of necessity an offence against the other. If, for example, I walk across your field, in order to shorten my way to a given point, I may not in the least injure you in respect of your right of user, although I violate your right of exclusion. Violations of the right of exclusion (when perfectly harmless in themselves) are treated as injuries or offences by reason of their probable effect on the rights of user and exclusion. A harmless violation of the right of exclusion, if it passed with perfect impunity, might lead, by the force of example, to such numerous violations of the right as would render both rights nearly nugatory.

The rights of user and exclusion (let them be never so extensive) are never absolute or complete: that is to say, they are always restricted (more or less) by rights residing in others and by duties incumbent on the owner. They are always restricted generally by the rights of others generally, and by the duties to which the proprietor is generally subject. Frequently, they are restricted by rights, over the same subject, residing specially in determinate parties: as by the rights of a joint- or co-proprietor, or by the rights of a remainderman, or reversioner, having also a right of property in the subject.

Where a determinate party has a right (as against the owner and the rest of the world) to put the thing to uses of a definite class, the party has a right over the thing, which is commonly called a *servitude*. Where a determinate party has a right (as against the owner and the rest

of the world) to a forbearance (on the part of the owner) from putting the thing to uses of a definite class, that party has also a right over the thing which also is styled a servitude.

Every servitude is *jus in rem.*

It is necessary (I apprehend) in order to the existence of a servitude, that the right of the party should be *jus in rem*, or a right against the world at large. If it merely availed against the owner (or against the other occupant for the time being) it would come under the predicament of *jus in personam.* And it is for this reason (as I shall show immediately) that no right of servitude is a right to an act. For if it were a right to an *act*, to be done by the owner (or other occupant,) it would merely avail against that determinate party, and would be a right arising from a contract, or from a *quasi*-contract.

A servitude is not a right to *specifically* determined uses, or to *specifically* determined forbearances on the part of owner or other occupant.

It is also necessary (I apprehend) in order to the existence of a servitude, that the party should have a right (of limited or unlimited duration) to put the subject generally to uses of a definite class: or to a forbearance generally (on the part of the owner) from putting the subject to uses of a definite class. For example, if I have a right (for life or years) of passing at all hours over your field, or of passing at certain hours over your field, I have a right of way: an easement or servitude. For I have a right of putting your field generally to uses of a definite description. But if you give me leave to shoot over your farm, once, twice, or any other definite number of times, my right derived from the license would hardly (I think) be deemed an easement. It would merely be a right against you, and perhaps against other persons generally, (derived from your particular license) to derive from your farm certain uses determined individually as well as by class or description.

[Perhaps it would be no right; but merely matter for justification, in case the owner or occupant brought trespass against the party licensed.]

Positive or affirmative servitudes (*quæ in patiendo consistunt*,) and negative servitudes (*quæ in non faciendo consistunt*).*

As I said in my last lecture, where the party entitled to the servitude has a right to *use* the subject, his right is styled, by modern civilians, "a positive or affirmative servitude." Where he has a right to a *forbearance* (on the part of the owner or occupant) from using the subject, the right is styled by the same civilians, a *negative* servitude.

By the Roman Lawyers, a positive servitude (in respect of the owner) is said to consist *in patiendo: i. e.* in his duty to forbear from molesting the other in the given user of the subject. A negative servitude (in respect of the owner) is said to consist *in non faciendo: i. e.* in his duty to forbear from using the subject in the given manner or mode. In either case, the right (it is manifest) is a right to a *forbearance* on the part of the owner: a forbearance from molesting the other in the given use, or a forbearance from using in a given mode.

As against the owner (or other occupant), *every* right of servitude is therefore *negative: i. e.* does not impose upon him a duty to do or perform. In respect of the party entitled to the servitude, a so-called positive or affirmative servitude, is, in a certain sense, positive as well as negative: *i. e.* it gives him a right to do acts over the given subject. But a negative service is *merely* negative: *i. e.* it merely gives him a right to a forbearance on the part of the owner.

A so-called negative servitude merely restricts the owner's right of user.

A so-called positive servitude restricts his right of exclusion *and* his right of user.

An example of a positive servitude, is, a right of way, or a right of common.

An example of a negative servitude, is, the "*servitus ne luminibus*" and "*ne prospectui officiatur*."† A right to the

* Von Savigny, Recht des Besitzes, pp. 534, 550.

† Mackeldey, vol. ii. pp. 77, 92.

unmolested enjoyment of *ancient* lights, is also a *negative* servitude.*

No right of servitude can consist *in faciendo*:† *i. e.* can consist in a right to an *act* or *acts* on the part of the owner or other occupant. For if it consisted in a right to an *act* to be done by the owner or other occupant, it were merely *jus in personam* against that determinate party.

No right of servitude can consist *in faciendo.*

In the case of a servitude, the *jus in rem* may happen to be combined with *jus in personam* against the owner: and so, may happen to be combined with a right to an *act*, against the owner: *e. g.* a right to have a way repaired by the owner.

[Quere. Whether every *servitus* be not *jus in personam* against the owner or other occupant, and *jus in rem* against the rest of the world?‡

Quere. Whether a negative servitude be *jus in rem?*]

Whether a negative servitude be *jus in rem.*

An affirmative servitude may clearly avail against *any*, and may be violated by *any*. *E. g.*: A stranger to the soil may violate a right of common, by putting his cattle on the commonable land?§ And in the case of a negative servitude, it is possible for a stranger (*e. g.* a trespasser) to *do* the act which would prevent the enjoyment of the servitude: *e. g.* to build up, or otherwise obstruct, ancient lights. In the case, however, of a negative servitude, it is less likely that a stranger should disturb; because the disturbance would not be an act of user.

Moreover, a negative service is *jus in rem* inasmuch as it avails *adversus quemcumque possessorem*: *i. e.* with or

* Blackstone, vol. iii. pp. 5, 217.

† Mackeldey, vol. ii. pp. 78, 88. Thibaut, Versuche, vol. i. p. 27.

‡ Blackstone, vol. ii. p. 36. Note 15. Hugo, Enc. p. 301. See Table II., Note 3, B. a. b. (*post*).

§ Blackstone, vol. iii. p. 327.

without title from the actual or preceding owner. Now as against an occupant without title, it could not be the result of a contract: for he is not privy to any contract of the present or any preceding owner. Still, however, it might arise from a quasi-contract: *i. e.* from the mere fact of his occupancy. It would seem that a duty to *do* (which must correlate with *jus in personam*) may attach upon the occupant by prescription.*

Note 1. [Remark: That though the occupancy, without title from the owner, were an injury against the owner, it would not be *per se* an injury against the party having the right of servitude. Consequently, though the adverse possession might be wrongful (and therefore could not be a quasi-contract) in regard to the owner, it might be a quasi-contract in regard to the party having the right of servitude.]

Note 2. [An affirmative as well as a negative servitude avails *directly* against the owner or other occupant of the subject. For an affirmative, as well as a negative servitude is a definite exception (accruing to the party having the servitude) from the indefinite powers of user and exclusion which the property in the subject comprises. Consequently, an affirmative as well as a negative servitude (considered exclusively with relation to the owner or occupant) might be deemed *jus in personam*. But since a right of servitude, positive or negative, *may* be violated by third parties, it implies a duty to forbear from disturbing, which lies upon third parties generally as well as on the owner or other occupant of the thing, and therefore is *jus in rem*.

And such disturbance by third parties would not affect the right *consequently* through a violation in a right residing in another.]

If, therefore, a negative servitude be *jus in rem*, it must (I think) be so for the reason I gave before: namely, that any person whatever might by possibility violate it, and that it therefore supposes a duty attaching upon persons generally. I said that a negative servitude *might* be *jus in*

* Blackstone, vol. ii. p. 36. Note 15. See Notes 1 and 2, pp. 47, 48, *ante*.

rem, if it were possible for any but the owner, or other occupant, to violate the right. But that remark was absurd. For as Mr. Mill* very truly observed, it would prove that every right *in personam might* be *jus in rem*.—If a negative service be *jus in rem*, it is so, because by possibility any may violate it, though none but the owner or occupant is likely to do so.

The distinction between an occupant without title, and a mere trespasser or other stranger is, that the former is exercising over the subject a right of property residing in another; while the latter does not affect to exercise any such right.†

Quere: Whether in every case of a negative servitude, the party entitled to the servitude does not *use* the subject of the right? Quere: Whether a negative service is not a right to use?

In one sense he may be said to *use* it, inasmuch as a certain state of the subject is essential to the enjoyment of his right. (*E. g.* A look-out. A right to have one's drainage pass off over the land of another.) But in another sense he does not always use it: *i. e.* he does no act by which the state of the thing is sensibly modified: (*e. g.* A look-out.) Sometimes, however, he may: as, *e. g.* where he has a right to receive water from his neighbour's land. But here, there is no *immediate* effect on the subject, produced by the exercise of the *jus servitutis*.

By negative servitude, seems to be meant any such servitude as does not need (to the exercise of it) an entry by the party on the subject. (*E. g.* Ancient lights.) For a right to abate an obstruction to a negative servitude is not essential.‡

N.B. In the case of *servitutes* the right which correlates with the obligation *upon the occupants* of the *prædium serviens*, though

* John Stuart Mill, Esq., author of 'Principles of Logic,' etc. etc., was one of Mr. Austin's class.

† To explain this distinction, we must analyse the right of possession.

‡ Blackstone, vol. iii. pp. 5, 217.

not a right against all, is a right against all who may occupy that *prædium*. Although, as against the actual occupant, it is an obligation attaching upon an assigned individual, and so may be considered as giving *jus ad rem;* yet it is also capable of attaching upon any of a number of unassigned persons (namely upon any occupant of the *prædium*, independently of his succession to or representation of the actual one,) [as *e. g.* it would attach upon a possessor without title, and therefore, not *successor singularis*] and, in that respect, gives, or correlates with, a corresponding *jus in re*.—It must also be observed that there is an obligation upon all who are *not occupants*, not to disturb. (Sed quere; since any obstruction by a stranger would rather be an injury (at least in many cases) to the owner.)

Absolute duties (positive or negative) annexed to property, are not servitudes.

A duty attaching on an owner of *jus in rem* may be an absolute duty: *e. g.* Duty to scour ditches, etc.: to keep a house in such a state of repair, etc. that it may not be generally dangerous. In these cases, there is no *servitus:* for there is no determinate person with a corresponding right.

By accident, a breach of the absolute duty may amount to an offence against a right in a determinate party. As *e. g.:* Neglect to repair a house may injure an individual.

Quere. Whether some of the so-called "servitudes" in the French Code are not absolute duties?]

Res servit.

The subject of the servitude is said itself to serve: *res servit;* which merely means, that the right of servitude avails (with or without limit in respect of duration) against every person whatever who has a right of property in the subject, or who, as adverse possessor, may exercise any right of property over it.*

If the servitude be properly so called, it also avails against the rest of the world, or is *jus in rem*.

If it be a servitude improperly so called, it is merely *jus in personam, ex contractu*, or *quasi ex contractu*, against every proprietor of the subject, or against any adverse possessor exercising rights of property over it.

* Mackeldey, vol. ii. pp. 75–6.

If it consist *in faciendo* (or in a duty on the owner or occupant to *do* or *perform*) it is necessarily in this plight. And it may be in this plight, although it consist *in patiendo* or *in non faciendo : i. e.* in a duty on the owner or occupant, not to hinder the given use, or not to use in the given mode. At least, the right to the forbearance may be, as against the owner or occupant, *jus in personam*, although it avail (at the same time) against the owner or occupant together with the rest of the world. (*E. g.* In case of a covenant added to a grant or prescription.)

I must here notice an absurd remark of Rogron. He says :

"Les principes généraux des servitudes s'appliquent à l'usufruit, à l'usage, et à l'habitation ; et surtout ce principe fondamental, que c'est la chose qui doit les services, et non la personne. *Prædium non persona servit.* D'où on conclut que le propriétaire est tenu de souffrir, et de laisser faire, et jamais de faire ; *car le fonds seul étant obligé,* il ne peut l'être que passivement."*

The true reason why a servitude cannot consist *in faciendo*, is, that, if it did, it could not be *jus in rem.* A duty to *do* (when not an *absolute* duty, or when corresponding to a *right*) being of necessity an *obligatio*, or a duty lying exclusively on a specifically determined party or parties.

Nulli res sua servit.

Inasmuch as every servitude is a definite subtraction or exception (accruing to the party having the right of servitude) from the indefinite rights of user or exclusion which reside in the proprietor of the thing, it follows, that no man has a right of servitude in a thing of which he is the owner: *Nulli res sua servit.* For if he had, he would have a right in the thing against himself: which is absurd. Consequently, if the party having a right of servitude acquire the property of the thing, the right of servitude is lost in the more extensive right, or, at least is suspended, so long as his right of property resides in himself.

* Rogron, *Code Civil expliqué,* vol. i. Livre ii. Titre 3.

"*Servitus*" means the *onus*, or the *jus in re*.*

The term "*Servitus*" has two meanings. It means, originally, the metaphorical servitude or duty of the thing: *i. e.* the duty really incumbent on any proprietor of the thing, or on any occupant of the thing exercising rights of property over it. But it means also the *jus servitutis*, or the right which corresponds to that duty: the *jus in re alienâ.*

A right of servitude may co-exist with any mode of property, etc.

It is clear that a right of servitude (of any extent in respect of duration) may co-exist with any mode of property in the same subject, or with the right of an adverse possessor exercising rights of property over it. Whether the thing be in lease or subject to property for life, or owned jointly or in common, or owned severally, or subject to any number of modes of property at one and the same time, the right of the party entitled to the servitude avails equally. For his right is a subtraction from the property of the thing, let that property be divided as it may, or let it be exercised with a perfect title, or only by virtue of a possession acquired adversely.

In short the right of servitude is a subtraction from the right of property (considered in respect of the powers of user and exclusion which the right of property naturally imports). And it therefore may be concurrent with any right of property in the same subject (be its duration and title what they may).

In cases of servitude, *semble* that the extent of the user (or of the power of interdiction) has no dependence on the extent of the duration.

And as a servitude is a *definite* subtraction from the right of property, it would seem that the extent of the user has no dependence on the extent of the duration.

Aliter in cases of property.

* Mackeldey, vol. ii. p. 76.

Note.

Wherever a man has a right to the services of another (whether it be unlimited, as in the case of unqualified slavery; or limited, as the right of the husband in the wife, the right of the wife in the husband, etc.) there is a combination of *jus in re* with *jus ad rem*: *jus in re* as against other persons; *jus ad rem* as against the person who is obliged to perform the services. All such rights belong to *Jura Personarum*: *i. e.* they suppose a *Status*. Quere; as to the obligation to perform a service as the occupier of a given subject; *i. e.* where the use is not derivable from the subject itself.—*Hugo, Enc.* p. 301. *Marginal Note.*

LECTURE L.

In pursuance of the order, wherein, in my last Lecture, I purposed considering the nature and the chief kinds of servitudes, I now proceed from the distinction between positive and negative servitudes, to the distinction between *personal* and *real* servitudes.

Distinction between *real* and *personal* servitudes.*

A *real* servitude (or a *real* right of servitude) resides in the party having the servitude, as being the owner or other occupant of a determinate parcel of land: or as being the owner or other occupant of a determinate building with the land whereon it is erected. And it is a right, against every owner or occupant of *another* parcel of land or building, to a power of using the latter in some definite mode, or to a forbearance (on the part of the owner or occupant of the latter) from using the latter in some definite mode. As I shall remark immediately, it hardly could be a right against the owner or occupant of a moveable thing.

A real servitude, therefore, supposes the existence of two distinct parcels of land to each of which it relates. For it is a right in a given person, as being the owner or occupant of a determinate parcel of land, against another given person, as being the owner or occupant of another determinate parcel of land. I use the term land as including land merely, or as including land with a building erected upon it. And hence it follows, that a real right of servitude

* Mackeldey, vol. ii. pp. 79, 80, 86. Table II. Note 5, 4 (*post*).

is said to be annexed to the parcel of land the owner or occupant whereof hath the right of servitude. Or, in the language of the English law, it is said to be *appurtenant* to the land or messuage the owner or occupier whereof hath the right of easement. The meaning of which expressions is merely this: that the right resides in the owner or occupant, as being such owner or occupant, and passes successively to every such owner or occupant for the time being, from every owner or occupant immediately foregoing.

And hence it also follows, that a real servitude (as meaning the *onus* or duty, and not the *jus* servitutis) is said to be imposed upon one of the two parcels of land for the use or advantage of the other: or that the servitude (as meaning the *onus* or duty, and not the *jus servitutis*) is said to be due to one of the two parcels of land from the other. That is to say, the duty is imposed upon every owner or occupant of the one (as being such owner or occupant) for the use or advantage of every owner or occupant of the other (as being such owner or occupant). Or the duty is due from every owner or occupant of the one (as being such owner or occupant) to every owner or occupant of the other (as being such owner or occupant).

And hence we may derive the origin of the metaphorical expressions, by which in the language of the Roman law, the two parcels of land (or the two *prædia*) are contradistinguished.

I have remarked above, that, in every case of a right of servitude, the thing which is the subject of the right, and not the owner or other possessor of the thing, is said to be burthened with the servitude (considered as an *onus* or duty): "*res* servit;" or "*res*, non persona, servit." Meaning, that the right of servitude avails against every person whomsoever, who may happen, for the time being, to have property in the thing, or, as adverse possessor, to exercise a right of dominion over it.

And, in the case of a *real* servitude, the parcel of land,

the owner or occupier whereof hath the right of servitude, is said to *dominate* over the land from the owner or occupier whereof the corresponding duty is owed. The former parcel of land is styled *prædium dominans;* the latter parcel of land is styled *prædium serviens:* being merely a case of the more general metaphor, by which any thing, happening to be the subject of any servitude, is said to be in a state of servitude.

The only difference, in this respect, between real and personal servitudes, consists herein: that in the case of a personal servitude, (or a servitude due to a person *not* as being the owner or occupant of a given parcel of land,) the thing, which is the subject of the servitude, is said to serve the person in whom the *jus servitutis* resides. But in the case of a *real* servitude, it is said to serve, not the owner or occupant of the related and opposed subject, but the subject itself.

The import of the related terms "*prædium dominans*" and *prædium serviens,*" I have explained with more clearness and conciseness in another place, than in the hurry of preparing a lecture I can often attain to. As the passage is very short, I will now read it.

4. "The servitudes of the Roman Law are of two kinds: 1°. Prædial or *real* servitudes ("servitutes prædiorum sive rerum"): 2°. *Personal* servitudes ("servitutes personarum sive hominum").

Now "*real*" and "*personal,*" as distinguishing the kinds of servitudes, must not be confounded with "*real*" and "*personal,*" as synonymous or equivalent expressions for "in rem" and "in personam." In a certain sense, all servitudes are *real.* For all servitudes are rights *in rem,* and belong to that *genus* of rights *in rem* which subsist *in re alienâ.*

And, in a certain sense, all servitudes are *personal.* For servitudes, like other rights, reside in *persons,* or are enjoyed or exercised by *persons.*

The distinction between "*real*" and "*personal,*" as applied and restricted to servitudes, is this: A *real* servitude resides in a

given person, as the owner or occupier, for the time being, of a given *prædium: i.e.* a given field, or other parcel of land; or a given building, with the land whereon it is erected. A *personal* servitude resides in a given person; without respect to the ownership or occupation of a *prædium*. To borrow the technical language of the English Law, *real* servitudes are *appurtenant to lands or messuages: personal* servitudes are servitudes *in gross*, or are annexed to the persons of the parties in whom they reside. Every *real* servitude (like every imaginable right) resides in a *person* or *persons*. But since it resides in the person as occupier of the given *prædium* and devolves upon every person who successively occupies the same, the right is ascribed (by a natural and convenient *ellipsis*) to the *prædium* itself. Vesting in every person who happens to occupy the *prædium*, and vesting in every occupier *as* the occupier thereof, the right is spoken of as if it resided in the *prædium*, and as if it existed for the advantage of that senseless, or inanimate subject. The *prædium* is erected into a legal or fictitious *person*, and is styled "prædium *dominans*." On the other hand, the *prædium*, against whose occupiers the right is enjoyed or exercised, is spoken of (by a like *ellipsis*) as if it were subject to a duty. The duty attaching upon the successive *occupiers* of the *prædium*, is ascribed to the *prædium* itself: which, like the related *prædium*, is erected into a *person*, and contradistinguished from the other by the name of "prædium *serviens*." Hence the use of the expressions "*real*" and "*personal*," for the purpose of distinguishing servitudes.

The rights of servitude which are inseparable from the occupation of *prædia*, are said to reside in those given or determinate *things*, and not in the physical persons who successively occupy or enjoy them. And, by virtue of this *ellipsis* and of the fiction which grows out of it, servitudes of the kind are styled "servitutes *rerum*" or "servitutes *reales*;" *i. e.* rights of servitude annexed or belonging to *things*.

The rights of servitude which are not conjoined with such occupation, cannot be spoken of as if they resided in *things*. And, since it is necessary to distinguish them from real or prædial servitudes, they are styled "servitutes *personarum*" or "servitutes *personales*:" *i. e.* rights of servitude annexed or belonging to persons. See Table II. Note 5 Paragraphs 7 and 8 (*post*).

A personal servitude (or a personal *right* of servitude)

resides in a given or determinate person, *not* as being the owner or occupier of a given parcel of land.

The expression "personal" (as here used) is, like a multitude of other expressions wearing a positive form, a merely negative term. It means that the servitude to which it is applied, is *not* a real servitude (in the sense which I have just explained): that it does *not* reside in the party entitled to it, as being the owner or occupier of a given or determinate thing *other* than the determinate thing over which the right exists. For (it is manifest) every servitude (personal or real) is, in some senses of the term "personal," a personal servitude: *i. e.* it resides, as a right, in *a person*, and is due, as a duty, from *a person:* although it may reside in the party entitled as standing in a given relation to a given thing, or as considered without relation to a given thing.

And (as is equally manifest) every servitude, personal or real, is, in some senses of the term "real," a real servitude. For, whether it reside in the party entitled, as being related to a given thing, or it reside in the party entitled independently of such relation, it is a right over a *thing* of which the burthened party is the owner or possessor, or (what is the same in effect) over a person (occupying a position analogous to that of a thing) of whom the burthened party is owner or possessor. (*E. g.:* We may conceive that the subject of the servitude is a *slave* of which the burthened party is either *dominus* or adverse possessor.) And whatever may be the character wherein the party having the servitude hath the same, his right of servitude is also *real*, as being *jus in rem:* for, as I have shown in former lectures and also elsewhere, the real and personal rights of the modern civilians (as well as their *jura in re* and *jura ad rem*) are, in their largest meanings, equivalent to the *jura in rem* and *jura in personam* of the same civilians, and to the *dominia* and *obligationes* of the Roman lawyers themselves.—Unless a servitude be *real* as meaning *jus in rem*, it is not a servitude properly so called: but it is merely a

right, availing exclusively against a determinate person or persons, and arising *ex contractu* or *quasi ex contractu*.

This negative import of *personal*, as applied to a servitude, ought to be marked particularly. For, in consequence of writers not having noted or remembered it, they have frequently missed the essence of the distinction between real and personal servitudes, and have regarded mere accidents as being essential to it.

For example: We are told by M. Rogron* (the annotator on the French Code whom I have already mentioned) that a real servitude is *real*, because it is due, not to a person, but to a thing: M. Rogron meaning thereby, (if, indeed, we can impute a meaning to him,) that it is due to a *person* as being related to a *thing* by his ownership or adverse possession thereof. And he tells us, conversely, that a personal servitude is a *personal* servitude, because it is due, not to a thing, but to a person: He meaning thereby, (in so far as meaning he hath,) that it is due to a person, independently of his ownership or adverse possession of any determinate thing.

And, in like manner, a right of common *in gross* (which is of a species of personal servitudes) is said, in the language of the English law, "to be annexed to the *person* of the party in whom it resides:" an expression which obscures and perplexes the true nature of the right; inasmuch as any right whatever, not less than any other right whatever, is annexed to, or inheres in, the person of the party entitled. The English Lawyers, however, unlike M. Rogron, do not mistake the import of the distinction, although they use expressions which tend to obscure it. For, in the same breath, wherein they tell us that a right of common in gross is annexed to the party's person, they tell us that it is *such* a right of common as is *not* appurtenant to a land or messuage.†

* Code civil expliqué, vol. i. p. 241.

† Blackstone, vol. ii. p. 33.

Again: we are told by modern expositors of the Roman Law, that a personal servitude is created for the advantage of the given *person* in whom it resides, is inseparable from his *person*, and necessarily ceases at his death:* In other words, that a personal servitude is necessarily an interest for the life only of the party entitled, and is by the party unalienable.

But, first: A personal servitude, though no more than a life interest, if the extent of the interest be not declared at the creation, may be given, by express words, to the party and his heirs. And, admitting that the Roman law determined otherwise, the limitation of the interest to the life of the party, were merely an accidental consequence of an accidental provision of the Roman law. For what is there in the essence of a personal servitude, that necessarily limits its duration to the life of the party?

With regard to its alleged unalienability, it was not alienable completely: that is to say, the party might cut out of it, and pass to another, any interest of limited duration short of his whole estate. But he could not so alien it, as not to leave a reversion in himself, and as to cast on the alienee the whole right of servitude.

But admitting that it was unalienable, its unalienability was a mere accident, and not a property inseparable from its very nature. There is no reason, why a right of common in gross should not be just as alienable as any right of property in the same subject.

The modern expositors of the Roman Law have, therefore, characterized a personal servitude, not by its true essence, but by certain of its mere accidents: mis-stating, by the bye be it mentioned, those very accidents.

And they probably were led into this error, by their not remarking that merely negative meaning of the epithet *personal* to which I have adverted. Seeing that the servitude is styled personal, they supposed that it must have some

* Mackeldey, vol. ii. pp. 79, 80.

special connection with the person of the party: that it was, in its very nature, inseparable from his person, or inseparably connected with his person: that it therefore expired necessarily with his person, or could not endure beyond his life, and was also unalienable to any other party.*

It is remarkable that unalienability (which they suppose to be of the essence of a *personal* servitude) is truly, in a certain sense, of the essence of a *real*. For since it is annexed to a given *prædium*, (or resides exclusively in the owners or occupiers thereof,) it cannot be aliened or detached from the *prædium* itself, (or cannot be aliened without the *prædium*,) without changing it from a real to a personal servitude. Insomuch that a necessary property of *real* servitudes has been mistaken for a characteristic mark of servitudes of the opposed class.

[*v. v. Semble*, that a real servitude can hardly exist over a moveable. (Suggest reason.)

In fact and practice, all the real servitudes of the Roman Law are servitudes over immoveables. It is essential to the being of a real servitude that there should be a "*prædium serviens*," and a "*prædium dominans*."

v. v. Semble, that a personal servitude, if a genuine servitude, and not one of the modes of property improperly called servitudes, can hardly exist over a moveable. (State reason.)

v. v. Negative and positive servitudes, and real and personal servitudes, are cross divisions. *E. g.:* A right of way or a right of common (both of which are affirmative servitudes) may either be appurtenant or in gross.

Perhaps negative servitudes are universally, or nearly universally, real.]

There is a distinction of real servitudes into *servitutes prædiorum urbanorum*, and *servitutes prædiorum rusticorum*. But as the distinction is peculiar to the Roman Law, and has no scientific precision, I pass it over as not belonging to my Course. I merely mention it for the sake of the terms.

* Mackeldey, vol. ii. p. 88.

An *urban* servitude has no necessary connection with a city or town. A *rustic* servitude has no necessary connection with the country.

An urban servitude is a real servitude appurtenant to a building (including the land whereon it is erected). A rustic servitude is a real servitude appurtenant to land (without reference to any building that may happen to be erected upon it).

The principal scope of an urban service, is, speaking generally, the commodious enjoyment of a dwelling-house to which it is annexed.

The principal scope of a rustic servitude, is, speaking generally, the commodious cultivation of a parcel of land to which the servitude is appurtenant. Consequently, urban servitudes occur most frequently in a city or town: rustic servitudes occur most frequently in the country. And hence the respective names of the two classes of servitudes: Though an urban servitude may be annexed to a building situate in the country, as a rustic servitude may be appurtenant to land within the boundary of a city or town.

Examples: A right to a forbearance from an obstruction to one's ancient lights, is an urban servitude: *i. e.* annexed to a building: A right to pasture one's oxen on land belonging to another, is, speaking generally, a rustic servitude: *i. e.* annexed to a farm, and not to any of the farm buildings.

By modern Civilians, and in the language of the modern systems of law which are mainly formed on the Roman, real and personal servitudes are marked and distinguished by those epithets.* In the language of the Roman lawyers, they are also marked and distinguished by those epithets, but are more commonly called *servitutes prædiorum sive rerum*, and *servitutes personarum sive hominum*. It is worthy of remark, that real servitudes, in the language of the

* Rogron, vol. i. p. 263.

Roman lawyers, are frequently styled *servitutes* simply: or that the name *servitutes* is frequently restricted to real servitudes, whilst personal servitudes pass under the generic name of *jura in re alienâ:* which, as I shall shew hereafter, comprises many rights not esteemed servitudes.

In the language also of the French Code, the term "*servitude*" is limited exclusively to real or prædial servitudes, or *services fonciers:* personal servitudes not being marked by any common epithet, but being designated exclusively by the names of their several species: As "*usufruit, usage, habitation,*" and so on.*

In the English Law, we have no adequate names to mark the distinction between real and personal servitudes, any more than we have an adequate name for servitudes. The names approaching to the Roman, would be, easements appendant and appurtenant, and easements in gross.

[*v.v.* Having endeavoured to explain, in general expressions, the distinction between real and personal servitudes, I will now cite a few examples of each kind.

A right of way appurtenant, and a right of way in gross.†

Common appendant or appurtenant, as opposed to common in gross.‡

Pews appurtenant to messuages and pews granted by the ordinary.]

The modes of *property*, which, in the language of the Roman Law, and of the modern systems borrowing its terms and classifications, are improperly styled "servitudes."

From the distinction between real and personal servitudes, I proceed to certain rights, which, in the language of the Roman law, and of the modern systems which borrow its terms and classifications, are improperly (as I conceive) styled servitudes. For, in all these cases, the party entitled to the so-called servitude has an indefinite power or liberty of using or dealing with the object.

* [*v.v.* Origin of the names real and personal servitudes. See Table II., Note 5, 4, two last paragraphs (*post*).

† Blackstone, vol. iii. p. 241.

‡ Blackstone, vol. ii. pp. 32, 428.

The right, therefore, is not a definite subtraction from the indefinite power of user or exclusion residing in the owner of the subject. It is not a servitude properly so called, but a mode of property or dominion.

The party has *condominium* (or joint property, or property in common) with, or concurrently with, another owner; or some right of property of limited duration (as an estate for life or years) upon which the right of property in the other owner is expectant in remainder or reversion.

Unless, at least, these so-called servitudes be modes of property, I cannot perceive that there is any intelligible distinction between *dominia* and *servitutes*, or account for the terms wherein the latter are commonly distinguished from the former. †All the rights in question are, it seems to me, rights of property for life.

[*v. v.* Enumerate and shortly describe them.*

1st. *Ususfructus*. *Quasi-ususfructus*. [This latter is admitted not to be *servitus*. Equivalent to an alienation.]

2ndly. *Usus*.

3rdly. *Habitatio*.

4thly. *Operæ servorum*. This is an instance of a so-called servitude over a person. As I have remarked above, a proper servitude is not likely to exist over a person. Belongs to *jus personarum*.

Usus, in Roman Law a species of usufruct: *i. e.* property for life, etc.

Not the "Use" of the English Law, which is *fideicommissum*. In so much that a use might be created to use (in the English sense): *i. e.* given in trust for another.

Usus (as used by Blackstone, Vol. II. p. 397.) is exactly equivalent to *usus* in the law of England: being a life interest, with reverter to the proprietor.]

All these various rights of *usufructus*, *usus*, and *habitatio*, would be deemed (I think) by English Lawyers, rights of property (for the life of the owner) variously restricted in

* Mackeldey, vol. ii. pp. 80 to 86.

† Hugo, Gesch. p. 463.

respect of the power of user. In our own law, we have various modes of property variously distinguished from one another by similarly varying limitations to the power of user: some of such restrictions being set by the dispositions of the authors of the interests; and others, by dispositions of the law, in default of such private provisions. For example: tenancy for life, with or without impeachment of waste, tenancy by the curtesy, tenancy in dower, etc.: In each of which cases, the indefinite power of user is restricted somewhat differently.

A remarkable thing is, that these miscalled servitudes are the only servitudes which are styled formally and usually, *personal servitudes:* Although it is manifest, that a servitude properly so called, or importing a power of using which is defined or circumscribed exactly, may not only be a personal servitude, but is the *only* personal servitude that is entitled to the name.

It is, indeed, admitted, by the Roman Lawyers and their followers, that if a servitude (which commonly is prædial or real) be not annexed to a *prædium* (but to the person of the party entitled) it becomes, for that reason, a personal servitude, and consequently is a species of *ususfructus* or *usus.** For example: A right of way in gross, or not appurtenant to a land or messuage, is a *personal* servitude, according to this admission.

Here, however, is a mistake. For though it would be a personal servitude, it would not be *ususfructus: ususfructus* imparting to the party entitled an indefinite power of user, and being in effect a mode of property.

And admitting that these improper servitudes *are* servitudes, why should *all* of them be placed in the category of *personal* servitudes? For it is conceivable (though not likely) that the usufruct or use of one thing may be appurtenant or annexed to the property or occupation of another. And admitting that these improper servitudes are servi-

* Mackeldey, vol. i. p. 87.

tudes, it is inconsistent to exclude the *superficies* and *emphyteusis* from the same category. For the improper servitudes, like these, import a power of indefinite user, and, like these, may be rights of indefinite duration: *i. e.* reside in the party and his heirs.

It seems indeed to have been perceived (though not very distinctly,) that these improper servitudes were not truly such. For (first) although they are styled servitudes in various passages of the Pandects, they are not styled servitudes in the Institutes, but are marked *seriatim* by the names of their respective species.* Describing things incorporeal (or rights) Justinian, in his Institutes, says, "Eodem numero sunt jura prædiorum, urbanorum et rusticorum, *quæ* etiam *servitutes vocantur.*" And having treated of *servitutes*, (limiting the term to prædial or real servitudes,) and having treated *seriatim* of usufruct, use, and habitation, he adds, "Hæc de *servitutibus, et usufructu,* et *usu,* et *habitatione* divisse sufficiat."

So that in the Institutes, the term *servitus* is limited to *real* servitudes; *ususfructus, usus,* et *habitatio,* are not deemed servitudes; and personal servitudes, properly so called, are passed over without notice.

Precisely the same method is followed in the French Code. In the second title of the second book, property or dominion is treated of. In the third title, *usufruit, usage,* and *habitation,* (which are not called servitudes,) are handled *seriatim.* And the fourth title is devoted to *Servitudes* or *Services fonciers: i. e.* real or prædial servitudes. So that in the French Code, as well as in the Institutes, personal servitudes properly so called are not formally mentioned.

Secondly, By Mr. Von Savigny, in his Treatise on Possession, it is remarked, that the possession of a right of usufruct, or of a right of use, resembles the possession of a thing, by the proprietor, or by an adverse possessor exercising rights of property over the thing. And that a dis-

* Institutes, pp. 28, 30.

turbance of the one possession resembles a disturbance of the other.*

Now this must happen for the reason I have already stated: namely, that the right of usufruct or user, like that of property, is indefinite in point of user.

For what is possession (meaning legal possession) but the *exercise* of a right?

This, therefore, is another case, in which the true nature of these improper servitudes has been perceived.

* "Die persönlichen Servituten haben das Eigenthümliche, dass die Ausübung derselben immer mit dem natürlichen Besitz der Sache selbst verbunden ist." . . . .

"Erworben also wird diese Art des Besitzes durch dasselbe Handeln, wie der Besitz der Sache selbst:" etc. . . . .

"Das Recht dieser Servituten ist an eine bestimmte Person gebunden, folglich unveräusserlich, folglich hat selbst die Veräusserung derselben (durch Verkauf, Schenkung, etc.) im Wesentlichen keine andere Wirkung als eine blosse Verpachtung."

Savigny, *Recht des Besitzes*, 5ter Abs. § 451, pp. 527, 531, 557.

LECTURE LI.

Primary Rights, etc. Rights *in rem, per se.*

I HAVE considered such distinctions between primary *jura in rem* as are founded on differences between the degrees wherein the entitled persons may use or deal with the subjects.

But primary rights of the class are also distinguishable by differences between the quantities of time during which they are calculated to last. And whatever be the quantity of time during which it is calculated to last, or whatever be the extent of its duration, a primary right of the class may be present or future; or, in other words, may be vested or contingent. And, if it be present or vested, it may be coupled with a right in the party to present enjoyment or exercise, or the right of the party to enjoy or exercise may be presently suspended or postponed.

From distinctions founded on differences between the extents of user, I shall proceed to the distinctions which I have now suggested: namely, the distinctions which are founded on differences between the durations of rights; between present or vested rights, and future or contingent rights; and between such present rights as are coupled with a right to present enjoyment, and such present rights as are coupled with a right to enjoyment to commence at a future time.

Of such distinctions between rights as are founded on differences between their durations.

In treating of rights in respect of their different durations, I shall follow the method which I observed when treating of rights in respect of the different powers of user respectively annexed to them: that is to say, *I shall assume that they are present or vested.*

Such distinctions inseparably implicated with modes of acquisition, or Titles.

Before I proceed to the distinctions between rights which are founded on differences between their durations, I must remark that these distinctions are inseparably connected with matter which I shall discuss in future lectures: namely, the various modes or titles by which *jura in rem* are respectively acquired and lost; or the various facts or events (or the various *causæ*) whereon rights of the class respectively begin and end. For example: Before we can understand exactly what is meant by a right of unlimited duration, we must know the nature of *descent* or of succession *ab intestato*. And before we can know the nature of *absolute* property, (or of property unlimited in duration, and alienable from those who without alienation would succeed on the death of the owner) we must know the various modes by which the right is alienable, either voluntarily or involuntarily: that is to say, with the free consent of the owner (as in the case of a sale or gift,) or in the owner's despite (as in the case of his bankruptcy, or of forfeiture for a crime.)

[Implication of rights in regard to their duration, with modes of acquisition.

Almost any right of any duration, or of any extent in point of user, may arise from one and the same title. Or one and the same title may give rise to any right, etc.: *e. g.*: Deed or will: By which may be created an estate for life, in tail, in fee. Occupancy and prescription generally give rise to rights of unlimited duration. But title by descent does not of necessity imply it: *e. g.*: Devolution of a term for years, to administrators of an estate *per auter vie.*]*

Much of what I shall utter, in regard to the distinctions between rights which are founded on their various durations, will therefore refer to the modes or titles by which rights are respectively acquired and lost. And such is the intimate connection between the various departments of every legal system, that such reference forward to matter

* Blackstone, vol. ii. p. 201.

yet unexplained, is an inconvenience which cannot be avoided by any expositor of law, although by long and assiduous reflection it might be considerably reduced.

Of such distinctions between rights as are founded on differences between their respective durations, the leading or principal one is this: that some are rights of unlimited duration, whilst others are rights of limited duration: a right of limited duration being of a duration definite as well as limited, or being of a duration, which, though limited, is not susceptible of exact circumscription. For example: An estate in fee simple, or absolute property in a personal chattel, is a right of unlimited duration. Property for the life of the owner, or for the life of another, is a right of limited but indefinite duration. Property for a given number of years is a right of a duration limited and defined.

It is obvious to remark, that, in respect of the party who actually bears the right, a right cannot be a right of unlimited duration. In regard to the party who actually bears the right, the right must cease on his death, if it cease not sooner.

Right of unlimited duration. By a right of unlimited duration, we must therefore mean, a right which may devolve from the party entitled through a series of successors of a given character or characters, which may possibly last for ever: meaning by a series of successors which may possibly last for ever, a series of successors to the continuance of which there is no certain and assignable limit. By the extinction of the series of successors, by the annihilation of the subject of the right, or by various other intervening contingencies, the right may cease. But there is no certain and assignable event (or no certain and assignable event imported by the right itself) on which the right must necessarily determine.

For example: An estate in fee simple, or an estate in fee tail, may devolve from the actual owner, or from the party

actually bearing the right, through a series of heirs which may possibly last for ever: that is to say, through a series of heirs to the continuance of which there is no known and assignable boundary.

As I have already remarked, the nature of a right of unlimited duration cannot be understood completely, without a foreknowledge of the nature of descent or of succession *ab intestato.* In order to the existence of a right of unlimited duration, it must be capable of devolving *ab intestato* from the party actually entitled, through an infinite series of successors, each of whom may take by descent: the first taking by descent from the party actually entitled; the second taking by descent from the first; and so on *in infinitum.*

I say it must be *capable* of devolving in the manner which I have now described through a series of successors which may endure for ever. For assuming that the right be alienable from that series of possible successors, either by the party actually bearing it, or by every or any in that series of possible successors, the right itself would cease on an actual alienation, and a new right over the subject would begin in the alienee.

I think, then, that a right of unlimited duration may be defined in the following manner: It is a right for the life of the party actually entitled, and capable of devolving *ab intestato* through a series of successors which may continue infinitely: meaning by infinite, infinitely, and infinitude, all that we can ever mean by those expressions: namely, the absence or negation of any end or limit which it is possible to assign.

The idea of a right of unlimited duration is therefore so inseparably connected with the notion of descent, (or with the notion of succession or devolution *ab intestato*) that it is scarcely possible to explain the former without explaining the latter.*

* Sir William Blackstone's notion of a right of unlimited duration accords with that which I have now stated. See vol. ii. chap. vii.

Right of limited duration.

By a right of limited duration, I mean a right which cannot continue beyond the happening of a certain and assignable fact, whether the duration of the right be definite or indefinite.

In the case of a right of unlimited duration, there is no certain and assignable limit beyond which it cannot endure. In the case of a right of limited duration, there *is* a certain and assignable limit beyond which it cannot endure: although the precise time at which the event which constitutes that assignable limit may happen, may not be capable of determination.

In the case, for example, of a right for a given number of years, the right cannot endure beyond the lapse of the given period. And in the case of property for the life of the actual owner, or for the life of another person, it must determine on the death of the owner, or on the death of the other person, though the time of that death is not of itself certain.

A right of unlimited duration (as I understand the expression) is not of necessity alienable by the party actually bearing it, from the possible series of successors *ab intestato*. For example: According to the older English Law, the tenant in fee simple could not alien (even with the consent of his feudal superior) without the consent of the party who was then his apparent or presumptive heir. And until tenants in tail were able to alien from the heirs in tail by fine or recovery, the estate tail was not alienable from any of the series of possible successors on whom by the creator of the estate it was destined to devolve.

I make this remark, because property of unlimited duration, and absolute property (or property with a power of aliening from the future successors *ab intestato*) seem to be often confounded.

As I shall endeavour to show immediately, absolute property is always accompanied with such a power of aliening. But property of unlimited duration (as an estate in fee simple or an estate in tail) is not of necessity absolute.

[*v. v.* Where a right of unlimited duration is not alienable from the future successors *ab intestato*, the right of the party actually entitled is in effect an estate for life.

Difference between a series of substituted heirs and an estate tail.

In either case unalienable, and therefore not* liable for debts of any actual tenant or actual heir.]

The power of aliening from successors who, in default of alienation, would take, does not *per se* distinguish a right of unlimited, from a right of limited duration. For this same power may reside in a party whose interest is limited: *e. g.* tenant for life of another, or a party who has a right for years.

Although alienability is not (rigorously speaking) of the essence of the right of unlimited duration, it is scarcely possible to conceive, that, in any society, all rights *in rem* could be unalienable. If they were, commerce would be impossible. And, by consequence, in every system of law, the power of restricting alienation has been limited: in some, nearly prohibited.

[Cases in which the party in whom a right of unlimited duration actually resides, is prohibited from aliening from his successors.

These cases are of two kinds:

1st. Those in which he is prohibited from aliening the very right, or the *res singula* which is the subject of the right: *e. g.* The English tenant in fee—according to the old law.

2nd. Cases in which he is prevented from aliening from his successors, the *universum* or some portion of the *universum* of his rights. *E. g.* The older Roman law; the Roman law as modified by the *legitima portio*; the French law of succession.

Where he is prohibited from aliening the *universum* of his rights, he is permitted to alien any of the single rights of which that complex and fluctuating whole may happen at any time to consist. Any part of them is also liable for his debts. And it is only with reference to his rights as considered singly or particularly, that he can be said to have a right of absolute property.

* Blackstone, vol. ii. chap. xix.

Limitations to right of alienation to prevent fraud on successors.

The party may destroy, spend, or consume, etc.: But may not give, except subject to certain limitations. Or if the gift be fraudulent, it is prohibited.

In what sense property in a personal chattel is a right of unlimited duration.

It may devolve *ab intestato* through a series of administrators representing the owner.

But it is not likely that it should: Because it forms a part of the university of his rights, and is therefore likely to be aliened for debts, etc.

Besides, the *universum* being divisible amongst next of kin, no one right is likely to continue in the same line of takers.

It would seem that the property is rather absolute (*i. e.* alienable from all possible successors) than of unlimited duration.]

The idea of absolute property, or of property pre-eminently so called, is: A right indefinite in power of user, unlimited in power of duration, and alienable by the actual owner from every successor who in default of alienation by him might take the subject.

This appears to be the notion of property as understood by the Roman Lawyers, in the French Code, by Mr. Bentham,* Blackstone, etc.

I say that property pre-eminently so called is alienable by the actual owner from every successor who in default of such alienation might take the subject. It therefore implies more than the power of aliening from his own successors *ab intestato*. For even where a right is a right of unlimited duration, another right may be expectant upon it. This, for example, is the case wherever a mesne lord of the fee is interposed between the tenant in fee and the King.

Generally, although the right be a right of unlimited duration, any number of rights may intervene between it and the State, as *ultimus hæres*, or the party who may occupy the subject as *res nullius*.

* Traités, etc., vol. i. p. 250. Blackstone, vol. ii. 446-7.

[*v. v.*] We may conceive that the subject on the expiry of all the rights attached to it may go to the State or to the first occupant. In England, the King, for this purpose, represents the State.

There is not properly (by the law of England) absolute property in land, in case there be a mesne lord interposed between the tenant and the crown: (supposing the crown to represent the Sovereign or State.) There is a reversion in the lord of the fee, which the tenant cannot defeat, although he may alien his own unlimited right. There is an analogy in this respect to the Roman emphyteusis: which though an estate of unlimited duration, and alienable, was nevertheless esteemed *jus in re alienâ*.

But in personal chattels there may be absolute property: *i. e.* a power of aliening from all successors between the owner and the *ultimus hæres*. Blackstone's analogy between fee simple and absolute property in a chattel is therefore false.*

In order to constitute property pre-eminently so called, or a power of aliening from all successors interposed between the party and the State, it would not seem that unlimited duration is essential. We may suppose an estate per auter vie, or for years, with reversion to the sovereign, alienable. [This is nearly the case with feuds in their inception.]

But, in this case, a power of user amounting to power of destruction must be tacked to it in order to make it absolute property.

Rights of limited duration.

1° A right which cannot continue beyond a given event that will certainly happen, although the duration of the right may not itself be susceptible of exact circumscription.

2° A right to last through a period which must cease on the happening of a certain event, although the time at which that event may happen cannot be determined.

* Blackstone, vol. ii. pp. 243, 261, 256.

Rights of limited duration, are rights of measured or exactly defined duration, or rights of unmeasured duration: meaning by measured, measured according to the legal measure of time, let it be what it may: *e.g.* so many revolutions of the earth round the sun, or of the earth on its own axis, etc.

[Cannot go into metaphysical difficulties about time. 1° Because, in different systems of law, that which constitutes the common measure of time (or rather, perhaps, that which constitutes time itself,) is determined very differently: 2° Because I have scarcely a tincture of mathematical or physical science.

[*E.g.* An estate for life: an estate for years.]

In case of a right of limited duration, succession is just as possible as in a right of unlimited duration: *e.g.*: in case of estate for years, or per auter vie. But here, it cannot endure beyond the limited period.

Alienability is not less incident to rights of limited, than to rights of unlimited duration.

In case the right be a right of property, power of user is also indefinite. But it never can extend to the destruction of the subject, or (what is the same thing) to depriving it of all the properties which make it a fit subject for human enjoyment or use. For the expectant on the rights of limited duration, there is necessary (or almost necessary) a right of [conservation],* or (what comes to the same thing) a right *quasi* in the sovereign or state. But where there is merely a reverter to the state, the power of user may extend to destruction.

* ; or, prevention of waste. See Blackstone, vol. iii. chap. xiv. The word is illegible in the original MS. Blackstone, vol. iii. chap. xiv., "preventive redress."

LECTURE LII.

In my last Lecture, I considered such distinctions between primary *jura in rem* as are founded on differences between their respective durations: or, in other words, between the quantities of time during which they are respectively calculated to last.

According to the purpose which I then announced, I should now proceed to the distinction between present or vested rights, and future or contingent rights; including the distinction between such present rights as are coupled with a right to present enjoyment or exercise, and such present rights as are not coupled with a right to present enjoyment or exercise.

The distinction between *Jus in re propriâ* and *Jus in re alienâ*: *jus in rem in re alienâ*.

But before I proceed to the distinction between vested and contingent rights, I will endeavour to explain a distinction, which, I think, may be considered conveniently at the present point of my Course: namely, the distinction made by the Roman Lawyers, and by the modern expositors of the Roman Law, between *dominion* strictly so called (*property* pre-eminently so called, *in re potestas*, or *jus in re propriâ*,) and that class of rights which they oppose to *dominion* strictly so called, (or to *jus in re propriâ*,) by the name of *jura in re alienâ*, *jura in re*, or (more briefly and elliptically still,) *jura*.*

I advert to this distinction between *jus in re propriâ* and

* Thibaut, 'Versuche,' vol. ii. pp. 84, 91. Tables, I. II., *post*.

jus in re alienâ, for two reasons. 1st. The explanation of this distinction may tend to illustrate the two capital and inseparably connected distinctions with which my recent lectures have been particularly occupied: namely, the distinction between rights which import an indefinite, and rights which import a definite power of user or exclusion; and the distinction between rights of unlimited duration and rights of limited duration.

2ndly. Without an idea of the distinction between *jus in re propriâ* and *jus in re alienâ*, as understood by the Roman Lawyers and the modern expositors of the Roman law, their writings, to an English Lawyer, are extremely perplexing.

For many of the rights *in rem* which they rank with *jura in re*, or with *jura in re alienâ*, would rather be esteemed by an English lawyer modes of property or ownership, than mere fractional rights subtracted from property in another. Such (for example) is the case (as I shall show presently,) with the emphyteusis: a right closely analogous to an estate in fee simple, and from which (it is supposed by some,) the various systems of law, commonly styled feudal, took their origin. Such is also the case with certain rights, which, in the language of the Roman law, are styled *servitudes:* but which, as I showed in a preceding lecture, would rather be deemed by us, modes of property. Such is also the case with the right *in rem* of the pledgee or mortgagee, or the creditor whose right *in personam* is secured by a *pignus* or *hypotheca*.

By the Roman lawyers, he is deemed to have *jus in re alienâ*, although the pledgor or mortgagor was *dominus* or absolute proprietor of the thing pledged or mortgaged. But according to the law of England (or, at least, of its strict law, as contradistinguished from its equity,) his right in the subject of the pledge or mortgage would rather fall under the category of property or ownership, than under that of rights over subjects owned by others.

In order to an explanation of the distinction between *jus in re propriâ* and *jus in re alienâ*, I must briefly revert to the nature (which I referred to in my last lecture,) of dominion *strictly so called*, property *pre-eminently so called*, *absolute* dominion or property, or the dominion (property or ownership,) which is the least restricted or limited. For every *jus in re alienâ* is a fraction or constituent portion (residing in one party,) of absolute dominion or property residing in another party.

Property, pre-eminently so called, absolute property, *dominium* (s.s.) or *jus in re propriâ*.*

And in order that I may explain the nature of absolute dominion or ownership, or of *jus in re propriâ*, I must briefly advert to the nature of *res publicæ*, or of that right (or rather of that power,) which the State possesses over all things within its territory or jurisdiction.

***Res publicæ* (in the largest sense of the expression.)**

It is manifest that the State (or sovereign government,) is not restrained by positive law from dealing with all things within its territory at its own pleasure or discretion. If it were, it would not be a sovereign government, but a government in a state of subjection to a government truly supreme.

Now since it is not restrained by positive law from dealing at its own pleasure with all things within its territory, we may say, (for the sake of brevity, and because established language furnishes us with no better expressions,) that the state has a *right* to all things within its territory, or is absolutely or without restriction the *proprietor* or *dominus* thereof. Strictly speaking, it has no *legal right* to any thing, or is not the legal owner or proprietor of any thing: for if it were, its own subjects would be subject to a sovereign conferring its legal ownership upon it. When, therefore, I say that it has a right to all things within its territory, (or is the absolute owner of all things within its territory,) I merely mean that it is not restrained by positive law from using or dealing with them as it may please.

* Thibaut, 'Versuche,' vol. ii. p. 85 *et seq.*

Consequently, if we take the expression *res publicæ* with the largest meaning which it will bear, all things within the territory of the state are *res publicæ*, or *belong* to the state (in the sense above mentioned).

Res publicæ (in the narrower sense), and *res privatæ*.

But of the things which belong to the state, there are some which it reserves to itself, and some the enjoyment or use of which it leaves or concedes to determinate private persons. To those which it reserves to itself, the term *res publicæ* is commonly confined: those, the enjoyment or use of which it leaves or concedes to determinate private persons, are commonly called *res privatæ*.

Classes of *res publicæ* (in the narrower sense of the term).*

Of *res publicæ* (taking the expression with the narrower sense to which I have now adverted,) various distinctions might be made.

For there are some, which, without leaving or conceding the use of them to determinate private persons, it nevertheless permits its subject generally to use or deal with in certain limited and temporary modes. Such, for example, are public ways, public rivers, the shores of the sea (in so far as they are not appropriated by private persons,) the sea itself (in so far as it forms a part of the territory of the state,) and so on. *Res publicæ*, the use of which the state thus permits to all its subjects, are commonly styled *res communes*: though the term is sometimes confined to certain things, of which the subjects generally are supposed to have the use by a title anterior to any that the state can impart.

[*v.v.* The limitation of the term *communes* arose from the erroneous notions about the law of nature to which I have adverted in former lectures.]

Again: Of *res publicæ* (or of the things which the state reserves to itself,) there are some which it reserves to itself in a more especial manner, and some which it concedes to public persons (individual or complex,) as trustees for itself. The former are sometimes styled "the patrimony of the state,"

* Mühlenbruch, vol. i. p. 163.

or are said to belong to the *fisc*. Such, for example, is the money which it raises by taxes on its subjects, the land which it reserves especially for its own peculiar use, or the *res privatæ* which revert to it by forfeiture or escheat as being the ultimate *hæres* of all its subjects. Those which it concedes to public persons as trustees for itself, are styled by the Roman lawyers *res universitatis*: things being in the patrimony of corporate bodies. And, they were so called, (I presume,) because the public persons to whom they were conceded, were commonly complex or collegiate, rather than individual persons: as, for example, the corporate governments of cities. But the term *res universitatis* is manifestly inapplicable. For we may conceive that a *res publica* resides in a public person who is individual or single. And every corporate body is not public.

It is manifest that the distinctions to which I now have adverted, blend at various points. For example: Of the *res publicæ* which are in the patrimony of the state, or which it reserves to itself in a more especial manner, it may concede some to private persons for periods of shorter or longer duration: It may let, for instance, a part of its domain to a private person in farm. And in these cases, the things would seem to become, during those limited periods, *res privatæ*. In these cases, however, the things are granted out to private persons, rather for the benefit of its own peculiar patrimony, than for the advantage of the private grantees. Whereas in the case of *res privatæ*, the things are left or conceded to the determinate private persons, rather for their own advantage, than for that of the state.

And of *res universitatis*, or things which it concedes to public or political persons, some will naturally fall under the species of *res publicæ* which are styled *res communes*. Such, for example, is the case with a road or river, the property of which resides in a public corporation, but which it holds in trust to permit all the subjects of the state to pass and repass it.

One class of things which occurs in the Roman Law, and is there distinguished from *res publicæ*, I will also briefly advert to: namely, *res divini juris*. But *res divini juris* are merely a class of *res publicæ*. They are things specially reserved by the state or granted in trust to public persons, and destined to certain uses. The opposing them to *res publicæ* proceeds from the logical error so frequent in the writings of lawyers: namely, the co-ordinating as parts or members of one homogeneous system, various classes of objects which are derived from cross divisions.

Having given a brief statement of the leading distinctions between *res publicæ* (as opposed to *res privatæ*,) I now return to *res privatæ*: that is to say, things of which the state is the ultimate owner, but the use or enjoyment of which it leaves or concedes to determinate private persons, rather for their own advantage, than for the immediate benefit of its own patrimony.

With regard to *res privatæ* (as thus understood), they may be left or granted to private persons with various restrictions: with various restrictions in respect of user, and with various restrictions in respect of time.

In respect of user, the right (or series of rights,) which is granted by the state, may amount to a mere servitude, (or a right to use the thing in a definite manner) or to property (in any of its various modes). In which last case, the property may be burthened with a servitude (or with a something analogous to a servitude) reserved by the state to itself.*

Quasi-servitus over a thing, reserved by the state to itself.

For example: we may conceive that the state may grant to a private person a right of way, or a right of common, over land in its own patrimony.

* *Communia* may be considered as subjects reserved by the Sovereign, but over which he permits others to exercise certain *servitutes*. *Res singularum*, etc.; subjects which the government concedes to others with a right of total exemption: *e. g.*: taxation.—*Hugo, Enc.* lib. ii. p. 298.

On which supposition, the grantee would have a right analogous to a servitude over the given subject. I say "analogous to a servitude:" for a servitude, properly so called, is a burthen on the *property* of another; and property properly so called, or *legal* property properly so called, the state has not, and cannot have.

Quasi-servitus reserved by the state over a *res privata*.

Or, assuming that the right granted by the state amount to a right of property, we may suppose that the state reserves to itself a something analogous to a right of servitude. For example: we may suppose that it reserves to itself (in case the subject of the property be land,) all the minerals under the land, with the right or power of working for them. In most or many countries, all land owned by private persons is held subject to a special reservation like that which I have now mentioned. And, in our own country, the King (who, for the present purpose, may be deemed to represent the State,) is also commonly entitled to any of the more precious minerals which may be found under land belonging to any of the subjects.*

Absolute property, *dominium* (s. s.), or *jus in re propriâ*.†

With regard to *time*, the thing may be subject to a right of limited or unlimited duration, or to a series or succession of any number of rights, each being a right of limited or unlimited duration. For, as I remarked in my last lecture, a thing which is subject to *one* right of unlimited duration, may also be subject to another right of the same unlimited duration. This, for example, is the case with freehold land, (according to the Law of England,) where the tenant in fee simple is properly a *rere* vassal, and the interest or estate of the mesne lord is also an estate in fee simple. And if we suppose that the mesne lord held of a mesne lord interposed between him and the king, and that the estate of either lord were an estate in fee simple, here would be three estates (each of unlimited duration), each of which must expire before the

* Blackstone, vol. i. chap. 8.

land could revert to the king as representing the sovereign or state.

And cases may be imagined, in which the thing would be subjected to a much longer series of rights of unlimited duration, each to take effect in enjoyment on the expiration of the right preceding.

But whatever may be the right (or the series of successive rights) to which the thing is subject, presently or contingently, that right, or that series of rights, must be liable to end. If the right be of limited duration, (or each of the series be of limited duration) it must end on the lapse of the time fixed for its duration. If it be a right (or a series of rights) of unlimited duration, it must also be liable to end on the failure of persons who by the constitution of the right are entitled to take it.

Now on the expiration of the right, or of the series of rights, to which the thing is subject, presently or contingently, the thing reverts, as of course, to the sovereign or state: for since the state (speaking by analogy) is the ultimate owner of the subject, it also (speaking by a similar analogy) is the *ultimus hæres*. On the expiration of all the rights over the thing, which merely subsist over the thing by its own pleasure, it naturally retakes the thing into its own possession.

But in different countries, the practice in this respect is different. In some, the thing (generally speaking) is actually resumed by the state as *ultimus hæres*. In others, the state does not exercise its right or power of resumption, but leaves the thing to the first occupant: who, by virtue of his occupancy, takes from the state a fresh right, which is also liable to end like the preceding right, on the extinction of which he stepped into possession.*

But, in this case of acquisition by occupancy, the occupant may be considered as merely representing the sovereign: or,

* Mühlenbruch, vol. i. lib. ii. § 91.

rather, the thing in effect reverts to the sovereign, and the occupant acquires from the sovereign a new right.

Where, in our own country, the thing is resumed by the sovereign, and is not conceded by the sovereign to the first occupant, it reverts to the king. But the king may be deemed, for this purpose, as merely representing the sovereign. For, according to the old and irregular constitution, in which the prerogative in question arose, the king *was* sovereign; and, instead of sharing the *sovereign* powers with his parliament, great council, or what not, merely received from them suggestions and advice for the guidance of his conduct. There is much, at least, of our legal language, of our established forms of judicial procedure, and even of the forms observed by our present parliament, which cannot be explained on any other supposition. And I observe that Mr. Palgrave (in those parts of his Commonwealth of England which I have had time to examine) appears to lean to the supposition that the king was originally the sovereign.

Now since the occupant takes in the place of the sovereign, and since the king takes as representing the sovereign, I shall assume that the thing, on the expiration of every right to which it is actually subject, invariably reverts to the sovereign government, in every country whatever.

[*v. v.* Interpose a remark on the king's title to personal chattel without owner. (Blackstone, vol. i. pp. 295, 298.)

v. v. In the Roman law, the same rule prevailed in case of dereliction: which, if the party relinquishing be absolute owner or *dominus*, is, as I shall show immediately, tantamount to the expiration of every right in the subject.]

With what I have premised, I can now (I believe) determine the nature of absolute property: of dominion strictly so called; or of *jus in re propriâ.*

It is not only a right of unlimited duration, and imparting to the owner a power of indefinite user, but it also gives him

a power of aliening the subject from all, who, by virtue of any right existing over the subject, might, in default of such alienation, succeed to it.

It therefore implies more than a power of aliening the subject from those who might succeed by descent to his own unlimited right. It implies a power of aliening from all those possible successors, and *also* from all *other* successors, who, by virtue of any right existing over the subject, are interposed between the possible successors to his own unlimited right, and the sovereign as *ultimus hæres*.

The mesne lord has not absolute property. He has merely *nuda proprietas* (or *proprietas* simply): *i. e.* absolute property subject to a right of indefinite user (as well as of unlimited duration) residing in the tenant. In the language of the English Law, he has merely a *reversion* expectant on the determination of the tenant's usufruct: a usufruct unlimited in point of duration. And hence it follows, as I remarked in my last lecture, that, according to the English Law, there is no absolute property in land: or, at least, there is no perfect dominion in land, where there is a mesne lord between the tenant in fee simple and the king as *suzerain*.

For there is a reversion in the mesne lord which the tenant in fee cannot defeat by his own alienation: though by his own alienation, he can divert the land from his own heirs general, or from the series of possible successors to his own right of unlimited duration. If he were absolute owner, he would stand to the mesne lord in the relation in which tenant in tail stands to those in remainder or reversion expectant on his own estate tail.

[Explain.]

The term property, as, in a preceding lecture, I opposed it to *servitus*, includes many rights which are not rights of *absolute* property: that is to say, every right of limited, or of unlimited duration, which imparts to the person entitled an indefinite power of user, although it is not coupled with

the power of aliening from every possible successor between the party and the *ultimus hæres.*

Having endeavoured to determine the notion of absolute property, of dominion strictly so called, or *jus in re propriâ,* I can now explain the nature of *jura in re alienâ.*

Jura in re alienâ.

Every *jus in re alienâ* is a fraction or particle (residing in one party) of dominion, strictly so called, residing in another determinate party.

But *jura in re alienâ* have no other common property than that which I have now stated. Different rights of the class are composed of different fractions of that right of absolute property from which they are respectively detached. Some are mainly definite subtractions from the right of user and exclusion residing in the owner. Others are indefinite subtractions from his power of user and exclusion for a limited time; and so on.

Different *jura in re alienâ* are different fractions of the various rights which constitute the *dominium* from which they are respectively detached.*

The *jura in re alienâ* which commonly are marked by modern expositors of the Roman law, are, *servitus, emphyteusis, superficies,* and the *jus in rem* which is taken by a creditor under a pledge or mortgage.† And, to show the nature of the distinction between *jus in re propriâ* and *jus in re alienâ,* I will briefly advert to each of the four in the order wherein I have stated them.

The classes of *jura in re alienâ* which are noted by expositors of the Roman Law: viz. *Servitus, Emphyteusis, Superficies,* and *Jus pignoris et hypothecæ.*

[Preliminary remark.

v. v. Jura in re opposed to *dominium rei singulæ,* and both to the dominion acquired by the heir in the university. (See Table I., *post.*) I am now confining myself to *dominium rei singulæ.*

* Thibaut, Versuche, vol. ii. p. 85. System, vol. ii. p. 8.

† Mackeldey, vol. ii. p. 6.

[From this point the manuscript of this Lecture consists of loose notes.—*S. A.*]

Servitus.

Servitudes properly so called (whether affirmative or negative, real or personal) were esteemed *jura in re alienâ*, because they gave a right of definite user over a subject owned by another, or of subtracting a definite fraction from the owner's right of user or exclusion.

Servitudes improperly so called (*ususfructus, usus, and habitatio*) were property for life limited to life of owner, though the limitation for life was not essential.

When property for life, they were *jus in re alienâ*, because they were subtracted from the dominion of the author or grantor, and on their expiration reverted to the grantor or his representatives.*

Emphyteusis.

Though of unlimited duration, accompanied with power in the emphyteutor of unlimited user, and though alienable from his own heirs, emphyteusis was nevertheless *jus in re alienâ*; because it was a right or estate carved out of another estate, or having a reversion expectant upon it. It reverted to the author or grantor or his representatives. It was not absolute property, because there was no power of aliening from all future succession.†

[It was analogous to a fee-simple where the land is held of a mesne lord. Or analogous to an estate in fee of copyhold tenure.]

Where an estate in fee simple of freehold tenure is subject to a quit rent, there would seem to be a *servitus* in the lord, as lord of the fee. So in case of copyhold. So in case of emphyteusis.‡ Or perhaps an obligation *quasi ex contractu*. Or a *servitus* and an obligation combined.

[Rarity of *jus in re* uncombined with *jus in personam*.

Usufruct unlimited in duration, etc., would have resembled emphyteusis.

And this is another inconsistency about those improper servi-

* Mackeldey, vol. i. cap. 4, p. 103.
† Gaius, lib. iii. § 145.
‡ Blackstone, vol. iii. chap. 15.

tudes mentioned in a former lecture. If usufruct be a servitude, so ought emphyteusis to be deemed one; for a usufruct or any other personal servitude may be granted to a party and his heirs.]

The feudal system has been supposed to originate in emphyteusis, which, being granted for military service, is analogous to a feud in its origin, and may have suggested the idea. (Palgrave.) But it seems doubtful.

Remark on the generality sometimes given to the term feud. It is extended to any property in land (of limited or unlimited duration) granted on condition of military service. But this is too general to characterize what is called peculiarly a feud. The latter is an historical idea.

Dominium directum et utile: Origin of the expression. Extension of it to any case in which a mere reversion remained in the lord, on the expiration of a feud of indefinite duration: because here it is analogous to emphyteusis.

Superficies

Is clearly not a *servitus*.

And inasmuch as it exists concurrently with another right of property over the same subject, it would seem to fall under the notion of *condominium* (*i. e.* joint property or property in common), rather than property which is *jus in re alienâ; i. e.* which is carved out of property in another, and is to revert to the grantor.

Inconsistency of including improper servitudes with servitudes, and not including superficies. For an improper servitude, like superficies, gives a right of indefinite user, and may be a right of unlimited duration.

Jus pignoris et hypothecæ.

The right of the creditor by virtue of a pledge or mortgage. Why *jus in re alienâ?* It imparted a mere power of disposition.

The obliged thing (or the subject of the mortgage) may be itself *jus in re alienâ:* for example, a personal servitude, a usufruct, an emphyteusis. So that here is *jus in re alienâ* over a subject which is also *jus in re alienâ.*

The right of the creditor is double: *jus in personam*, in respect of the debt secured: *jus in rem*, in respect of the subject which is pledged or mortgaged on a security. For, as against every possible possessor of the subject, whether taking by succession *ab intestato*, or alienor from mortgagor, or possessing adversely, his right to the thing for securing his debts endures.

Hence the thing is said to be obliged:—to be subject to a lien.

[Another instance of combination of *jus in rem et in personam*. I consider these separately as far as possible. Roman Lawyers do not.]

Difference between the right of the mortgagee in English law and Roman.

In the Roman law, It is a mere right of the creditor to alien the obliged thing in case the debt is not duly satisfied, and to reimburse himself; debt, interest, and incidental costs.

In the English law, It gives a property to the creditor in the pledged thing, which becomes at law complete on non-payment of the debt. In Equity, however, the mortgagor is still the owner; and the creditor has merely a lien for satisfaction of his debt. But there is this difference between Roman and English Law. In the English, the creditor may foreclose, and acquire the thing. In the Roman, he can only sell. His right is that of mortgagee with power to sell, provided that power also excluded foreclosure. In the Roman Law, the creditor could not acquire property in the subject.

Remarks on the term "jura in re alienâ:" sometimes called jura in re, or jura.

"*Droits réels*" is ambiguous, as sometimes denoting *jura in rem*, and sometimes *jura in re* (s. s.). This arises from the extension of *jus in re* to *dominia*, and of *jus ad rem* to *obligationes* or *jura in personam*.

Difficulty: Where a thing is subject to a series of rights,—is subject to a series of vested rights (descendible perhaps from

present vestees), or to contingent rights to *determinate* parties, existing or not.

But the right of the occupant is not even inchoate. There is no specifically determinate party (existing or not) to take the right. It is nothing but a right that may accrue to everybody capable of taking, who may occupy.

Rights of which it is difficult to fix the class.

Qc. Right of disposition without right of user.

Power of appointing without power of enjoying. See Blackstone, vol. iii. p. 243.

If coupled with a right to enjoy the subject, a power of appointment is in reality tantamount to a power of aliening, generally or partially. If of appointing to any object whatever absolutely, it renders the limited interest to which it is attached absolute property.

[Observe that a right of disposition does not necessarily suppose a right of user: And that an unlimited right of user by way of consumption, supposes no right of disposition.

A limitation of user, as well as of disposition, is, however, necessarily supposed, wherever there is a *vested* right in another; since the last would otherwise be nugatory.]—*Marginal Note.*

A right to personal tithes, is not a servitude. So far as it amounts to *jus in rem*, it is a right without a specific subject: analogous to a right in a monopoly; a right in an office; a right to a toll; a right to jurisdiction, etc. The right in each particular case to exact the tithe, is *jus in personam* arising from a quasi-contract; like right to possession against a possessor *bonâ fide*.

[Tithe is a *Servitus* combined with an obligation (s. s.) on the occupant: A right to a part of the produce of the subject *adversus quemcunque*, with an obligation on the actual occupant to set out, etc.—*Marginal Note.* Blackstone, vol. iii. p. 89.]

Analogous also to the case of right in a servant;—my right against him is *jus in personam*; but my right against the rest of the world, *in rem*.

Qe. whether prædial tithe be a servitude? And, if so, whether real or personal? It is attached to an office.

Mackeldey, vol. ii. cap. 3, p. 80. *Id.* from p. 105 to 112.
Blackstone, vol. ii. p. 104.
Thibaut, System, vol. ii. chap. 2.
Savigny, Recht des Besitzes, p. 557.
Mackeldey, vol. ii. pp. 127–8.
Table II., note 4 (*post*). Von Savigny, Recht des Besitzes. Thibaut, Versuche, vol. ii. pp. 85, 91.
Blackstone, vol. iii. p. 243.
Blackstone, vol. iii. p. 89.

LECTURE LIII.

A present or vested right, what.

In this evening's discourse, I shall consider the distinction between vested and contingent rights.

In order to the existence of a right, the two following (amongst other) essentials must concur:—1st. A determinate person or persons, presently existing, in whom the right resides. 2ndly. That the title, mode of acquisition, or investitive fact, to which the law annexes the right, be presently consummate or complete.

Hence it follows, that the epithet "present" or "vested," as applied to a right, is superfluous or tautological. Every right, properly so called, is of necessity present or vested: that is to say, it presently resides in, or is presently vested in, a present and determinate party, through the title, or investitive fact, to which the law annexes it as a legal consequence or effect.

When we oppose a vested or present, to a future or contingent right, we are not, I apprehend, opposing a *right* of one class to a *right* of another class, but we are rather opposing *a* right to the *chance* or *possibility* of a right. Accordingly, the contingent right of the apparent or presumptive heir to rights which the party presently entitled may alien from him, is frequently styled, not *a right*, but *spes successionis*: that is to say, the chance or possibility, that the heir, who has not presently a right, may hereafter acquire one. And, generally, a contingent right is frequently styled "*spes; spes incerta; hoffnungsrecht*" or hope-right: a present *chance*, or a present *possibility*, that *a right* may hereafter

arise, and may vest in a person in being, or hereafter to be. When, then, in compliance with custom, I use the expressions "*vested* and *contingent* rights," I am not opposing *rights* of a class to *rights* of another class, but *rights* to *chances* or *possibilities* of rights.

And here I would advert to a meaning, frequently annexed to the expressions "*vested rights*," which is mentioned in Mr. Lewis's* treatise "On the Use and Abuse of Political Terms."

When it is said that the legislature ought not to deprive parties of their "vested rights," all that is meant is this: that the rights styled "vested" are *sacred* or *inviolable*, or are such as the parties ought not to be deprived of by the legislature. Like a thousand other propositions, which sound speciously to the ear, it is either purely identical and tells us nothing, or begs the question in issue.

If it mean that there are no cases in which the rights of parties are not to yield to considerations of expediency, the proposition is manifestly false, and conflicts with the practice of every legislature on earth. In every case, for example, in which a road or canal is run by authority of parliament through the lands of private persons, the rights, or *vested* rights, of the private owners are partially abolished by the legislature. They are compelled to yield up a portion of their rights of exclusion, and to receive compensation agreeably to the provisions of the Act.

When the expression "vested right" is used on such occasions, it means one or another of two things:—1st. That the right in question ought not to be interfered with by the legislature; which (as I have remarked already) begs the question at issue; or, 2ndly, that, in interfering with rights, the legislature ought to tread with the greatest possible caution, and ought not to abolish them without a great and manifest preponderance of general utility. And, it may

* Now Sir George Cornewall Lewis. He was a member of Mr. Austin's class.

be added, the proposition, as thus understood, is just as applicable to *contingent* rights, or to chances or possibilities of rights, as to vested rights, or rights properly so called. To deprive a man of an expectancy, without a manifest preponderance of general utility, were just as pernicious as to deprive him of a right without the same reason to justify the measure.

Before I proceed to contingent rights, or to chances or possibilities of rights, I must remark that vested rights, or rights properly so called, are divisible into two classes:— 1st. Present or vested rights which are coupled with a present right to enjoyment or exercise: 2ndly. Present or vested rights which are *not* coupled with a right to present enjoyment or exercise.

For example: If I am absolute owner of land or a moveable, not subject to a right in another of limited duration, I have not only a present right to or in the subject, but also a right to the present possession of it: that is to say, a present right to enjoy or exercise my present right of ownership.

But if the subject be let to another, I have a present right of ownership without a present right to *exercise* my right of ownership: I have merely a reversion, expectant on the determination of the lease, and which, till the lease determine, cannot take effect in possession.

Or if a legacy be given to an infant, but with a direction in the will that the legacy shall not be paid to him till he come of age, he has a present or perfect right to the legacy, although he cannot touch it before he shall become adult. For if he should die before he come of age, the legacy would not lapse, (or the gift would not be inoperative), but the legacy would pass to the successors of the legatee, and not to those of the testator. It is not a gift *conditioned* to take effect *in case* the infant shall come of age, but an *absolute* gift with a direction suspending the payment to him until he shall come of age. If he should die before he come

of age, his successors would be entitled to present payment, as well as to a present right in the subject of the bequest.*

A right, therefore, may be present or vested, although the right to enjoy it or exercise it, be contingent or uncertain. Or, in other words, a present and certain right to possession is not of the essence of a present and certain right.

For example: In the case of the legacy, to which I have just adverted, it is presently uncertain whether the infant will ever be entitled to the payment: but still he has a present right to the subject of the bequest, inasmuch as the right would pass to his successors though he himself were to die before the period fixed for payment.

Again: In every case of a vested right, expectant on the determination of a preceding right, the right of the expectant to possession or enjoyment is necessarily uncertain. For, though he has a present or perfect right, to take effect in possession on the determination of the preceding right, he may die himself (or even die without representatives capable of enjoying the expectancy), before the preceding right shall come to an end.

The distinction which I have tried to explain ought to be carefully marked. For it is often supposed, even by writers who commonly perceive the distinction between vested and contingent rights, that a right to present enjoyment is of the essence of a present right: or, what comes to the same thing, that a right of which the enjoyment or exercise is uncertain is necessarily an uncertain or contingent right.

[Examples:—Blackstone, vol. ii. p. 163. "Of estates in *possession* whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, etc.:" as if a right not in possession might not be coupled with a present interest.]

A future or contingent right, what.

I have said already, that in order to the existence of a *present* right, or in order to the existence of a right properly so called, the two following (amongst other)

* Blackstone, vol. ii. p. 513.

essentials, must concur:—1st. A determinate person or persons, presently existing, in whom the right resides, or in whom it is vested. 2ndly. That the title, mode of acquisition, or *causa*, to which the right is annexed as a legal consequence or effect, be presently consummate or complete.

Hence it follows, that a right is contingent in either of the following cases:—

1st. The right is contingent, if the person to whom it is destined or determined, (or in whom it is to reside or vest,) be not presently existing. In this case it is supposed that the events constituting the title whereon the right is to arise have already happened wholly or in part: but that though the title be presently consummate, the right nevertheless is presently contingent, inasmuch as the person to whom it is determined may never exist to take it.

2ndly. The right is contingent, if the person to whom it is determined be presently existing, but the title, or mode of acquisition, whereon it is to vest in that person, be not presently consummate, and never may be.

In this last case, it is necessarily supposed that the title is complex (or consists of two or more successive events): that one or more of those events has already happened: but that one or more of those events has not yet happened, and may never happen.

For example: If land be now given by deed or will to A for his life, and after A's death to the eldest son (now unborn) of B, in tail or in fee, the right which is determined by the gift to the unborn son of B is contingent. By the gift itself the title is presently complete: for if B had now a son, the estate in tail or in fee would now be vested in him, although his right to possession, or to the enjoyment or exercise of his right, would not begin till after the determination of A's estate for life. But though the title is presently consummate, the right nevertheless is presently contingent: for it is presently uncertain whether B will have a son, and whether the person to whom the right is determined will ever exist.

Again: If land be given to A for his life, and, in case B (a person now existing) shall survive A, to B in fee, the right which is determined by the gift to B and his heirs general is presently a contingent right. For though the person to whom it is determined is now in existence and capable of taking it, the title, or mode of acquisition, whereon the right is to arise, is presently inchoate only, and perhaps will never be consummate. By the gift to B, in case he shall survive A, a part only of the complex title has presently happened. Before it can be consummate, and the right determined to B can vest or come into existence, A must die, leaving B surviving him: which event, forming a part of the entire complex title, has not yet occurred, and possibly may never occur.*

Wherever, therefore, the person to whom the right is determined is not presently in being, or wherever the title is presently inchoate, and its consummation is presently uncertain, the right is contingent: that is to say, there is not properly *a right*, (residing, as a right must do, in a present person or persons), but a present *chance* or *possibility* that a right may arise hereafter, and may reside in the person or persons, existing or to exist, to whom it is determined or destined.

The two grounds of uncertainty to which I now have adverted may happen to exist together in one and the same case: that is to say, the person to whom the right is determined may not be yet in being, and the title determining the right to the person may yet be merely inchoate, and its consummation contingent. Insomuch that the right would be presently contingent, although the party were presently existing.

For example: If an estate were given to the eldest son of B, (B having presently no son,) on condition of B or his son doing some given act, the right would be contingent in two ways. For it is uncertain whether the person

* Blackstone, vol. ii. pp. 169, 170.

to whom the right is determined will ever exist. And, though the person presently existed, the deed or performance which is a part of the entire title, would be contingent. Until B have a son, *and* B or his son do the given act, there is no right properly so called, but a mere chance or possibility that a right may arise and vest in a given party.

As a further example of contingent rights, I may mention the *spes successionis* which resides in the *presumptive* or *apparent* heir: meaning, for the present, by the heir, the person who takes from the *dominus*, or absolute owner, in the way of succession *ab intestato*.*

Strictly speaking, the apparent or presumptive heir is not heir. For *nemo est hæres viventis*. In order to the existence of the relation between the predecessor and the successor, the predecessor, in the case of heirship, must have died: that is to say, must have died physically, or must have died civilly. By the apparent heir, we mean the person who would be heir presently, if the party, to whom he is heir apparent, presently died intestate. By the presumptive heir, we mean the person who would be heir presently, if the party presently died intestate, and no person entitled to take as heir in preference to the presumptive heir came into existence before the decease.

Now it is manifest that the right of the apparent heir is a contingent or uncertain right. Before he can acquire as heir properly so called, he must not only survive the party to whom he is heir apparent, but that party must die *intestate;* and, in case the subject of the uncertain succession be some single right, and not the university or aggregate of the party's rights, that party must also die without having aliened the right in his lifetime.

The right of the presumptive heir is more uncertain still. For before he can acquire as heir properly so called, the party to whom he is heir presumptive must die in his own

* Blackstone, vol. iii. p. 224. Mackeldey, vol. i. p. 217. Mühl. vol. i. p. 146.

lifetime; the party also must die intestate, or intestate and without having aliened the right by act *inter vivos;* and no party entitled to the heritage in preference to the presumptive heir, must come into being, between the time present and the happening of all those other contingencies.

Such is the influence of words over the understanding, that I thought, at first, the right in question was not a contingent right: that it was a present or vested right liable to end on certain contingencies; that is to say, the death of the so-called heir before the decease of the party to whom he is presently heir (apparent or presumptive); alienation by the party in the way of will or otherwise; and so on.

But this difficulty arose from the name which is improperly given to the apparent or presumptive heir. In truth he is not *heir:* for *nemo est hæres viventis.* He is merely the person who will be heir in case certain contingencies shall conspire to cast the heritage upon him. He has not a present or perfect right: but he has merely an inchoate right which *may* become consummate, in case certain facts necessary to the completion of his rights shall arise hereafter in his favour. And, accordingly, his so-called right is commonly called *spes successionis:* that is to say, not *a right,* but a chance or possibility that he may acquire a right.

The test, then, of a *vested* right (or of *a right* as opposed to a *contingent* right or to the *chance* or *possibility* of a right) is, I apprehend, this:—

If the right be perfectly acquired, or if the whole series of facts necessary to its existence have already happened, the right is *present* or *vested,* or (in other words) *is* a right.

If the right be not perfectly acquired, or if that whole series of facts be presently incomplete and may never become consummate, the right is *contingent* or *uncertain,* or is rather a *chance* or *possibility* that a right may hereafter arise.

And in order to the perfect acquisition of the right, or to the completion of the series of facts whereon the right arises, two things must conspire.

1st. The title to which it is annexed must be consummate: that is to say, the fact (or the whole series of facts), constituting the title, must have happened already.

2ndly. The person to whom it is determined by the title must have come into existence, and must actually be entitled to the right, or (if he have died, and the right be transmissible), must have transmitted it to his own successors.

If the title be not consummate, or if part of it consist of a contingency or of a fact which may never happen, the right is presently contingent. And though the title be consummate, the right also is presently contingent, in case the title determine it to a person who is not yet in existence. For, to the being of a perfect right, the existence of a person in whom it resides is not less requisite, than the consummation of the title by which the right is vested in him.

I apprehend that a right is contingent, in case the title be incomplete and may never become consummate, although the completion of the title depend upon the will of a present party to whom the title determines the right. This, for example, is the case, in the Roman Law, where a party dies intestate, but the heritage is not cast on the apparent or presumptive heir *ipso jure:* that is to say, where the heir, in order to the completion of his title, or in order that he may become *heir* perfectly and truly, must *adire hæreditatem*, or accept the heritage.

Until he accept the heritage, he has a right deferred or proffered by the law (*jus delatum*), but he has not a right fully acquired (*jus acquisitum*): so that if he repudiate the inheritance, it passes over to a party who takes as heir to the intestate, and not through the party to whom the heirship has been merely proffered. In this case, the party who has *jus delatum* has merely a contingent right, although the happening of the contingency necessary to the consummation of his title, depends upon his own will.

The same may be said of the right of the heir (according to the law of England), who has not completed his title,

upon the death of the ancestor, by doing some act which amounts to *seisin*: that is to say, taking possession (physically or constructively), of the land which has descended from the ancestor. The ancestor being dead, intestate and without otherwise aliening, the heir has *jus delatum* (to borrow the language of the Roman Law), which he may turn into *jus acquisitum* by an act of his own: that is to say, by taking seisin or possession of the subject. But, until he fully acquire by seisin or possession, he has not a present or vested, but merely a contingent right. Insomuch that if he die before *seisin*, the land will not descend through him, but will descend to some party who acquires as immediate successor to the predeceased ancestor.

The same may be said of parties who are *entitled* to probate or to take out letters of administration. By virtue of the will, or of the relation wherein they stand to the deceased, they have *jus delatum*: which, by proving the will, or by taking out administration, they may convert into *jus acquisitum*. But they are not *ipso jure* representatives of the deceased; and must do a contingent act, depending on their own will, before their inchoate right can become consummate.

If, then, a right be determined to a party who may never come into existence, or if the title be incomplete, and may never be consummate, the right is contingent: that is to say, it is presently uncertain whether the right will ever arise. And this is the only mark of a contingent right which I have been able to discover.

Mr. Fearne, in his beautiful essay "on Contingent Remainders and Executory Devises," lays down the following, as the invariable test by which a vested remainder is distinguished from a contingent one. "It is not the uncertainty of ever taking effect in possession, that makes a remainder contingent. The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become va-

cant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."*

Now I cannot help thinking that this test of a vested remainder is fallacious.

For we may imagine a *contingent* remainder which is presently capable of taking effect in possession, in case the preceding estate were presently to end.

For example: If land be given to A for life, and, in case B survive A, to B in fee, B has a contingent remainder: For it is uncertain whether B will survive A. And yet the estate of B, so long as B lives, is presently capable of taking effect in possession, in case A's estate presently determined. For if A were now to die, leaving B him surviving, B's estate would not only become vested by the happening of the given contingency, but, by the happening of the same event, would also take effect in possession: that is to say, B would become entitled to a present or perfect right coupled with a right to present enjoyment or exercise.

The present capacity of taking effect in possession, if the possession were now to become vacant, will not then distinguish a vested from a contingent remainder: inasmuch as there are contingent as well as vested remainders to which that same capacity is incident.

But whether Mr. Fearne's test be or be not a test of a vested *remainder*, it certainly will not distinguish vested rights *generally* from contingent rights *generally*. For, by our own law, and other systems of law, there are numberless present rights, and numberless contingent or uncertain rights, which are not vested or contingent remainders, and have little or no resemblance to them.

In the case, for example, of a specific legacy given to an infant absolutely, but with a direction that the payment shall be deferred till the infant come of age, the test can have no application. There, the right of the legatee is a pre-

* Fearne, p. 216.

sent right, and cannot take effect in possession till he come of age. But there can be no question about its present capacity of taking effect in possession. For there is no preceding interest on which it is expectant, and on the determination of which the enjoyment is to commence. The absolute ownership is now in the infant, and yet the infant cannot enjoy until the arrival of the period fixed by the will.

The only marks of a contingent right which I have been able to discover are those which I have endeavoured to explain.

1st. Although the facts constituting the title have all of them happened, (or, more briefly, although the title be consummate,) the right is a contingent or uncertain right, if it be determined to a party who may never come into existence.

2ndly. Although that party be in existence, the right nevertheless is a contingent right, if the title be not consummate, and may never be completed.

And here I would remark, that a contingent right, or a chance or a possibility of a right, may be transmissible to the heirs or representatives of the party to whom the right is determined. It may, indeed, happen, that the existence of the party, at a given time, may be the very contingency, or parcel of the very contingency, on which the right is to arise. And, on that supposition, if the party die before the given time, the contingent right can never vest, and there is no possibility *transmissible* to his representatives.

For example: If land be given to A for life, and in case B survive A, to B and his heirs, if B die before A, the contingent right can never vest.

But if the existence of the party at a given time be not parcel of the contingency, the contingent right (if it be calculated to endure beyond the party's life,) may devolve to his representatives.

For example: If land be given to A for life, and, in case C

survive A, to B and his heirs, B has a contingent right transmissible to his representatives. The contingency on which the right is to arise is the death of A, leaving C surviving. And if B die before the contingency happens, the chance or possibility still exists, and may pass from B himself to the heirs or representatives of B.

[Query. Whether *jus in rem* may be future without being contingent?

In all these cases there seems to be a present or perfectly acquired right, of which the enjoyment is postponed to a future but certain period.]

There are two senses wherein a right may be styled *contingent:* one of which senses is large and vague; the other, more strict and definite.

In the large and vague sense, *any* right to which *any* body (now in being or hereafter to be,) may *any* how become entitled, is a contingent right. It is possible, for example, that I or you, or any body now in being or hereafter to be, may become owner or proprietor of A's house, or, more generally still, of any house whatever.

But when we oppose a *contingent* right to a *present* or *vested* right, we commonly mean by a "contingent right" a specifically determined right: and we commonly mean moreover that the right is inchoate, although the right is not consummate, and although its consummation be uncertain. A contingent right is a determinate right of which the title is inchoate, or an indeterminate right of which the title is not even inchoate, (unless in so far as capacity to take be a commencement.)

The contingent rights which are subjects of legal rules, are those which are inchoate: *i. e.* the title to which has begun, although (being a complex title, or consisting of several incidents) it is not consummate, and never may be: *i. e.* some of the incidents necessary to complete it, have not happened.

The right also must be determinate: *i. e.* the inchoate title must not consist in a mere general capacity to take rights, or rights of a given class: *e. g.* The right of the presumptive or apparent heir is a contingent right determinate and inchoate.

The mere capacity of taking an estate in fee simple is not a title to any determinate right.

The mere capacity of husband is also distinguishable from that of heir. It is a capacity to take his share of any rights to which the wife may become entitled. But that of the heir is an inchoate and determinate right: *i. e.* the party stands in a *relation* to the deceased which forms part of the title, and the right itself is a right to a given *res singula* or to a given *universitas*.

Sometimes, however, we speak of contingent rights in the larger and vaguer meaning. For example: The contingent rights embraced by the *spes successionis*, are any contingent rights to which the heir will become entitled on the death of the predecessor. So, again, a mortgage of all a man's future rights.

In considering the distinction between present and contingent rights, I have considered it as abstracted from all the peculiarities of the English Law. To expound the distinction as concrete in those peculiarities, with vested remainders, contingent remainders, executory devises, conditional limitations, etc., and all these implicated with distinctions between law and equity, and real and permanent property, would take volumes.

These spring mainly from seisin.

In treating of vested and contingent rights, I have confined my remarks to *jura in rem*, or to rights which avail against the world at large. But distinctions resembling those to which I have just adverted also obtain between rights of the opposite class.

Every *jus in personam*, or which avails exclusively against

a person or persons determinate, is a right to an act or forbearance. But the act to be done, or the forbearance to be observed, may be to be done, or to be observed, either certainly, or on the happening of a given contingency. If it be to be done certainly, the right may be deemed *vested.* If it be to be done on a condition, or on the happening of a contingency, the right may be deemed contingent.

And if it be to be done certainly, it may be to be done presently, (or on the demand of the obligee,) or it may be to be done at a determinate future time. In the first of which cases, the right may be deemed a present right, coupled with a right to immediate fulfilment. And in the last of which cases, the right may be deemed a present right, of which the fulfilment is presently postponed.

A right (vested or contingent), which is liable to end before the lapse of its possible duration.

First, as to vested rights.

(a. 1.) Where the right is a right of limited and defined possible duration, it may be made liable to end, on happening of a given contingent event, before the lapse of the defined period for which it is calculated to endure. (See Blackstone, vol. ii. p. 143.)

(a. 2.) Where the right is a right of limited but indefinite possible duration, it may be made to end, on happening of a given contingent event, before happening of certain facts up to which it is calculated to endure. (See Blackstone, vol. ii. p. 121.)

(b.) Where the right is a right of unlimited duration, it also may be made to end, on the happening of a contingent event, before the lapse of its possible duration: *i. e.* to end on *another* given contingency before the contingent failure of the line of successors to whom it is capable of devolving, etc. (See Blackstone, vol. ii. p. 154.)

Secondly, as to contingent rights.

What has been said of a vested, is applicable (with a few modifications,) to a contingent right. For it may be made liable to end (*if it should ever vest,*) on a given contingency before the lapse of its possible duration.*

NOTES.

The *fidei-commissa* and trust-substitutions of Roman Lawyers are placed with inheritances: for, with them, contingent interests were created by will. Even, therefore, where the subject was a *res singula,* it was considered after testaments.

* Contingent interests not allowable by strict Roman Law.†

Dispositions suspending vesting, and preventing alienation.

In the case of *usus,* etc., there was no remainder over to a third party (still less an uncertain party on an uncertain event,) but a mere reversion in the grantor descendible to his heirs.

(Gaius, Lib. ii.; from § 179 to § 274.)

Conditional fees and estates tail to be ranked with substitutions, fidei-commissa, etc. To rank them with inheritances, (*i.e.* with rights which devolve agreeably to law in default of a disposition,) leads to nothing but confusion. Such an inheritance or fee ought to be considered as a series of life-interests. The language resembles that of the Roman *Fidei-commissa.* (See Mackeldey.)

Various means of limiting inalienability: In the Roman Law, directly: In the English, by fictions. (Blackstone, vol. ii. p. 110.)

* Blackstone, vol. ii. ch. 10, 152. Mühlenbruch, vol. i. p. 209. Mackeldey, vol. ii. p. 463.

† See "Outline," Vol. II., under Universitas; p. xci.

LECTURE LIV.

I HAVE considered primary rights *in rem*, as existing *per se*, or as not combined with rights *in personam*, from various aspects. Primary Rights, etc. Rights *in rem*, *per se*.

I first considered the rights in question as distinguished by differences between their respective *subjects*, or between the aspects of the forbearances which are respectively their *objects*. Addressing myself particularly to such of the rights in question as are rights in or over specifically determined things, I then considered the rights in question as distinguished by differences between the degrees wherein the entitled persons may use or deal with the subjects. In other words, I considered the distinction between *property* or *dominion* (meaning by property or dominion, any right of the class in question which gives to the party entitled an indefinite power of using or dealing with the subject), and *servitus* or easement.

I next considered the rights in question as distinguished by differences between their durations or between the quantities of time during which they are calculated to last.

Having considered the rights in question as distinguished by differences between the degrees wherein the entitled persons may use or deal with the subjects, and having considered the rights in question as distinguished by differences between their durations, I next adverted to a distinction which I found it impossible to explain, until I had treated of the two distinctions to which I have now adverted: namely, the distinction between *jus in re propriâ*, *absolute*

property, property pre-eminently so called, or dominion *sensu stricto*, and those various fractions of absolute property which are comprised by the generic expression *jus in re alienâ*.—As I endeavoured to show, the distinction between *jus in re propriâ*, or absolute property, and *jus in re alienâ*, does not quadrate with the two distinctions to which I have now adverted: namely, the distinction between rights *in rem* in respect of differences between the powers of user severally annexed to them, and the distinction between rights *in rem* in respect of differences between their several durations. For though absolute property is a right of unlimited duration and a right accompanied by a power of indefinite user, certain rights *in re alienâ* (as that, for example, of the *emphyteuta*, or of tenant in fee simple) are also rights of unlimited duration, and are accompanied with a power of user which is not susceptible of exact circumscription.

I lastly considered the rights in question in so far as they are distinguishable into vested and contingent: that is to say, into rights and *chances* or *possibilities* of rights.

And considering the rights in question as being *vested* or *present*, as being *perfectly acquired*, or as being *rights*, I distinguished such as are vested and are accompanied with a right to present enjoyment or exercise, from such as are also vested but are not accompanied with a right to present enjoyment or exercise.

Introduction to the consideration of *Titles*, or of *Investitive* and *Divestitive* Facts.

Having considered the rights in question from the various aspects now enumerated, I proceed to consider them in respect of their *titles*: meaning by their titles, the facts or events of which they are legal consequences, (or on which, by the dispositions of the law, they arise or come into being,) and also the facts or events on which, by the dispositions of the law, they terminate or are extinguished.

In considering *titles*, or investitive and divestitive facts,

I shall address myself particularly to titles as engendering or extinguishing rights *in rem* considered *per se:* that is to say, as not combined with rights *in personam.*

Titles as engendering or extinguishing rights *in personam*, and as engendering combinations (simple or complex) of rights *in rem* and rights *in personam,* I shall discuss particularly hereafter.

Title by succession *ab intestato*, and by succession *ex testamento*, I shall also pass over for the present; even in respect of the cases, (as, for example, a specific legacy) wherein it engenders a singular or particular right availing against the world at large. For the acquisition of a particular right (or of a *res singula*) by descent or testament, cannot be explained conveniently, unless acquisition by descent or testament of the university or aggregate of the intestate's or testator's rights be also explained at the same time.

Being engaged with the consideration of the Law of Things, I shall also for the present postpone the consideration of titles, in so far as they engender or extinguish *status* or conditions, and in so far as they are any way implicated with *status* or conditions.

Being engaged with the consideration of primary rights and duties, I shall also postpone delicts considered as titles, with the titles which arise from delicts in the way of consequence, till I come to treat of the rights and duties which I style sanctioning or secondary.

But though, in considering titles, I shall address myself particularly, for the present, to titles as engendering and extinguishing rights *in rem* considered *per se*, I shall preface my remarks on titles, as engendering and extinguishing the rights in question, by certain remarks which apply to titles generally.

From these remarks, applicable to titles generally, I shall proceed to the leading distinctions between titles as engendering or extinguishing rights of the class in question:

though, in considering those leading distinctions, and, indeed, throughout the course of my present disquisition, I shall often be obliged to advert to titles as engendering rights of other classes.

Having made certain remarks applicable to titles generally, and on the leading distinctions between titles as engendering and extinguishing the rights particularly in question, I shall consider *seriatim* certain titles, (as engendering and extinguishing (that is) the rights particularly in question,) which, in some shape or other, are found in every system, and are therefore appropriate matter for General Jurisprudence. The titles which are peculiar to particular systems, or such modifications of the titles common to all systems as are peculiar to particular systems, are foreign to the subject and scope of my Course; And when I mention them, I shall merely advert to them for the purpose of illustration.

Of the titles which I shall thus consider singly and *seriatim*, the following are the principal:

1st. The acquisition of *jus in rem* by *occupancy: i. e.* by the apprehension or occupation of a thing which has no owner, with the purpose of acquiring it as one's own.

2ndly. The acquisition of *jus in rem* by *labour: i. e.* by labour expended on a subject which has no previous owner, or even on a subject which has.

3rdly. The acquisition of *jus in rem* by *accession*: that is to say, through the medium of a thing of which one is owner already.

4thly. The acquisition of *jus in rem* by occupancy or labour combined with accession.

5thly. The various modes of acquiring *jus in rem* which fall under the generic name of *title by alienation*: meaning by alienation, the intentional and voluntary transfer of a right (or of a fraction of a right) by the party in whom the right resides, to another party.

6thly. The acquisition of *jus in rem* by *præscription*: the

consideration of which title will involve a previous consideration of the so-called right of possession.

7thly and lastly. Such modes of *losing* rights as are not involved by implication in *modes* of acquiring them. For as *every* mode of acquisition is not derived from a pre-existing title, so may a title end without engendering another. Occupancy, for example, is not a title derived from a previous title: for title by occupancy, strictly and pre-eminently so called, is a title consisting in the apprehension of what was previously no man's, with an intent to make it one's own. And so, where absolute property terminates by the annihilation of its subject, the mode by which the owner loses his right is not at the same time a title to a right in another.

In considering the titles to which I have now adverted, I shall commonly assume that the right which is the subject of the acquisition or loss, is absolute property, or dominion strictly so called, over a singular or particular *thing* in the proper acceptation of the name: noting from time to time, as I may see occasion, the effect of the title in question in engendering or extinguishing rights which are not rights of that class or description.

LECTURE LV.

Agreeably to the method or order which I announced in my last Lecture, I shall offer a few remarks applicable to titles in general, before I especially discuss them as engendering or extinguishing the rights to which I have now adverted.

Considered with reference to the modes wherein they respectively begin, or wherein the entitled persons are respectively invested with them, Rights, it appears to me, may be divided into two kinds.

1°. Some are conferred by the law, upon the persons invested with them, through intervening facts to which it annexes them as consequences.

2°. Others are conferred by the law, upon the persons invested with them, immediately or directly: that is to say, not through the medium of any fact distinguishable from the law or command which confers or imparts the right.

Taking the term "title" in a large and loose signification, (and also as meaning a fact investing a person with a right,) a right of either kind may be said to begin in a title. For, taking the term "title," with that large and loose signification, it is applicable to *any* fact by which a person is invested with a right: it is applicable to a law or command which confers a right *immediately*, as well as to an intervening fact through which a law or command confers a right *mediately*.

For, though, to some purposes, we oppose *law* and *fact*, a law or other command is of itself a *fact*: And where a law confers a right immediately, the law is the only fact

whereon the right arises, and is therefore the *title* (in the large and loose signification of that expression) by which the person is invested with the right. For example: By a special act of parliament, a monopoly, or a right of vending exclusively commodities of a given class, might be granted to a given person, for his own life, or for a term of years. Now, in this case, the privilege conferred by the special act of parliament might be strictly *personal:* that is to say, limited exclusively to the specifically determined grantee, and not transmissible to the heirs or assigns of the grantee, or to any persons of a given generic description.

And if it were strictly personal, it might be conferred by the act immediately or directly: that is to say, it might not be annexed by the act to any fact distinguishable from the act itself. And in this case, the act would be styled the *title* (in the loose signification of the term) from which the grantee derived the privilege.

But, taking the term "title" with a narrower and stricter signification, it is not applicable to laws which confer rights *immediately*, but is applicable only to the *mediate* or *intervening* facts *through* which rights are conferred by laws. In respect of this narrower and stricter signification, the rights of the two kinds which I am now considering may be distinguished by the following expressions: A right which is annexed by a law to a mediate or intervening fact, may be said to originate in a *title:* A right which is conferred by a law without the intervention of a fact distinct from the law that confers it, may be said to arise from the law directly or immediately; to arise *ipso jure;* to arise *by operation of law*, or by *mere* operation of law.

"Rights *ex lege immediatè*," "rights arising *ipso jure*," or "rights arising by operation of law," are terms (as I shall show hereafter) which are often misapplied. They are often applied to rights (as I shall show hereafter) which are annexed by the law to *mediate* or *intervening* facts. And the terms as thus applied, or as thus misapplied, denote, not

that the rights in question arise from the law *immediately*, but that the facts to which they are annexed are not facts of certain classes, or that they are annexed to certain facts unaccompanied by certain others.

For example: where a title has not acquired a brief generic name, the right is said to arise *ex lege immediatè*: that is to say, not from any of certain titles which have acquired such names, but from a title which is opposed to the others by that misexpressive phrase.

And when heirs of certain classes are said in the language of the Roman law to acquire the heritage *ipso jure*, it is not intended that they acquire the heritage without the intervention of a title, but that the title through which they acquire does not comprise a certain fact which, in the case of heirs of other classes, is parcel of the mode of acquisition: namely, *aditio hereditatis*, or acceptance of the heritage.

But when I speak of a right arising from the law immediately, arising *ipso jure*, or arising by operation of law, or mere operation of law, I use the phrase with its obvious and proper signification. I mean a right conferred by a law without the intervention of a fact distinguishable from the law that confers it. And I oppose it to a right conferred by a law through a *title*, or through the intervention of a fact which is distinguishable from the law, and to which the law annexes the right as a consequence or effect.

Having tried to suggest the distinction between rights arising from *titles*, and rights arising from laws *immediately* or *directly*, I will advert briefly to the following topics.

I will first advert to the nature of the few, and comparatively unimportant, rights, which arise from the law *immediately* (in the proper signification of the phrase): that is to say, *not* through a fact distinguishable from the law by which the right is conferred.

I will then advert to the *functions* of titles: or, in other words, to the reasons for which rights are commonly con-

ferred by laws through titles; and for which facts of certain descriptions are selected to serve as titles, in preference to facts of other descriptions.

The only rights which arise from laws immediately, are, I think, of the class of rights which are strictly *personal privileges*.

And here I must remark, that every privilege properly so called is a strictly personal privilege: that is to say, an anomalous right (or an anomalous immunity from duty) which is conferred by a law (also called a privilege) on a specifically determined person (individual or complex), as being that very person. For example: A monopoly granted to Styles, as being the individual Styles, is a strictly personal privilege: It is given to the very individual, as being the very individual, and therefore is not assignable or transmissible to his representatives. A monopoly granted to a corporate body, as being that very body, is also a personal privilege. For it is not exercisable by any but the complex person to whom it is granted specifically.

But though every privilege, properly so called, is, as it seems to me, a strictly personal privilege, the term is extended to certain anomalous rights (or to certain anomalous immunities from duty or obligation) which are not conferred on specifically determined persons as being those very persons.

For example: Certain so-called privileges are *privilegia rei*, or privileges conferred on *prædia*: meaning by a *privilegium rei*, or a *privilegium* conferred on a *prædium*, a privilege conferred on its successive owners or occupants as being such owners or occupants.

And of *personal* privileges (or of privileges conferred upon persons as *not* being owners or occupants of specifically determined *prædia*) some are transmissible and assignable to the heirs and alienees of the grantees, and are not exclusively exercisable by the very grantees themselves.

But, strictly speaking, a *privilegium rei* (or a privilege

granted to the occupants of a given *prædium*) is not a privilege. It is not granted to the parties as being those very parties, but as being persons of a given class, or as being persons who answer to a given generic description;—as being owners or occupants of the *prædium* or parcel of land, whereon, by an ellipsis, the privilege is said to be conferred.

Though the class of persons entitled in succession is comparatively narrow, the right may be likened to those anomalous rights which are occasionally granted to extensive classes of persons: as, for example, to soldiers, to infants, or to married women. And in these cases although the right, as being anomalous, is styled *singular*, and the law conferring the right is also styled *singular*, neither the anomalous right, nor the anomalous law conferring it, is deemed or styled a privilege.

For though the law and the right are "exorbitant" or "eccentric," although the law and the right are "singular" or "inelegant," or although they are not in keeping or harmony with the general tenor or spirit of the legal system, the right is conferred on the parties as answering to a generic description; or the right is conferred on the parties as belonging to a class of persons, and is not conferred on specifically determined persons as bearing their individual or specific characters.

A so-called personal privilege transmissible to heirs or assigns, is, in so far as it is so transmissible, in the same predicament with a *privilegium rei*. In respect of the person to whom it is first granted, it may be deemed a privilege. For, in respect of that person, it is granted to a party specifically determined as bearing his individual or specific character. But, in respect of the heirs of that person, or in respect of the persons to whom he may assign it, it is not a privilege properly so called. The law confers it upon them, not as being specifically determined persons, but as being persons of generic descriptions or classes: that is to say, as being the persons who answer to

the description of his heirs, or as being persons within the description of his alienees. And, accordingly, although the first grantee may acquire by the law directly, it is utterly impossible (as I shall show immediately) that his heirs or alienees should take from the law without the intervention of a title.

Every privilege properly so called, is, therefore, as it seems to me, a strictly personal privilege: an anomalous or eccentric right (or an anomalous or eccentric immunity from duty or obligation) which is conferred on a person specifically determined as being that very person. Whether the person be physical or individual, or fictitious and complex (or composed of many individuals,) is irrelative to the matter in hand. The essence of a privilege properly so called, is, it appears to me, this: that the eccentric or anomalous right is conferred on a specific person, not as belonging to a class of persons, but as bearing the specific character peculiar to him or it.

Now a privilege properly so called, or a strictly personal privilege, may be conferred by the privilege (as meaning the law which confers it) immediately or directly: that is to say, without the intervention of a fact distinguishable from the law itself. All that is necessary to the creation of the right, is the designation of the specific person by his specific character or marks, and a declaration or intimation that the right shall reside in that specified party.

I say that the privilege *may* be conferred by the law immediately or directly. For even in the case of a strictly personal privilege, the law may confer the right through a *title*. For example: It may grant a privilege to a person now an infant *in case* he shall come of age. On which supposition, the privilege will not rest unless the infant come of age; and the fact of his coming of age, is therefore a title, or investitive fact, necessary to the consummation of the right.

But though a strictly personal privilege *may* be conferred

by the law through a title, a title, or investitive fact, is not absolutely necessary to the being of the eccentric right. All that is absolutely necessary to the existence of a right of the class, is a mere designation in the law of the person on whom it is conferred, coupled with some declaration or intimation that that person shall take it.

But where a right is not properly a privilege, (or is not conferred on a specific person as being that specific person,) the right arises of necessity through a *title:* through a fact distinguishable from the law conferring the right, and to which the law annexes the right as a consequence or effect.

For example: If you acquire by occupancy, or by alienation, or by præscription, you do not acquire as being the individual *you,* but because you have occupied the subject, or have received it from the alienor, or have enjoyed it adversely for a given time, agreeably to the provision of the rule of law which annexes the right to a fact of that description.

And the same may be said of the privileges improperly so called, which are either *privilegia rei* (or privileges annexed to *prædia*), or are so-styled personal privileges passing to heirs or alienees. It is as being the occupant of the thing, and not as being the very person who then happens to occupy it, that the occupant of the thing acquires the so-called privilege. And it is as being the heir or the alienee of the first grantee, and not as being the very person who is heir or alienee, that the heir or alienee of the first grantee takes the privilege mis-styled personal.

In short, wherever the law confers a right, *not* on a specific person as being such, the law of necessity confers the right through the intervention of a title. For, by the supposition, the person entitled is not determined by the law through any mark specifically peculiar to himself. And if the right were not annexed to a title, it follows that the person designed to take it could not be determined by the law at all.

Instead, therefore, of determining directly, that the right shall vest or reside in a specifically determined person, as being such, the law determines that the right shall reside in any person whatever who shall stand in some given relation to a fact of some given class.

It is manifest that duties, as well as rights, may arise from the law *immediatè*, or may arise from the law through the intervention of facts to which the law annexes them.

Where the duty is relative, it arises from the very fact which engenders the corresponding right. Consequently, If the right be a privilege properly so called, the relative duty, as well as the right, may arise from the law immediately. If the right arise from a title, the relative duty as well as the right must arise from a title also.

In the case of absolute duties, the duty may either be imposed on a specified person as such, or may be imposed on a person through an intervening fact. In the first of those cases, the duty may be imposed by the law immediately or directly. In the latter of those cases, the fact through which the law imposes the duty, may also be styled a *title*. For, for the reasons which I shall assign hereafter, I apply the term *title* to every fact whatever, *through* which the law confers or extinguishes a right, or imposes, or exonerates from a duty.

And what I have said of rights and duties in respect of their commencement, will apply to rights and duties in respect of their termination: For a right or a duty may terminate by a specific provision of the law exclusively applicable to the specific instance: On which supposition, it may terminate by the law without the intervention of a fact distinct from the law which extinguishes it; and it therefore may be said to terminate by the mere operation of law. Or the right or the duty may terminate through, or in consequence of, a fact to which the law has imparted that extinctive effect. On which supposition, the right or duty

may be said to terminate through, or in consequence of, a *title*.

I will now briefly advert to the functions of Titles: or, in other words, to the reasons for which rights and duties are commonly conferred and imposed through titles, and for which facts of some kinds are selected to serve as titles, in preference to facts of other kinds.

It is I believe impossible, that every right and duty should be conferred and imposed by the law immediately. For, on that supposition, all the rights and duties of every member of the community, would be conferred and imposed on every member of the community by a system or body of law specially constructed for his peculiar guidance: since every right or duty conferred or imposed by the law immediately, is conferred or imposed on a person determined by the law specifically.

It is only in comparatively few, and comparatively unimportant cases, that rights or duties can be created or extinguished by the mere operation of the law. Generally speaking, rights must be conferred and extinguished, and duties imposed or withdrawn, through titles.

Independently, therefore, of every other consideration, titles are necessary as marks or signs to determine the commencement of rights or duties, and to determine their end. In other words, titles determine the several rights, and the several duties, which respectively reside in, or are respectively incumbent upon, the several members of the community.

Titles are necessary, because the law, in conferring and imposing rights and duties, and in divesting them, necessarily proceeds on general principles or maxims. It confers and imposes on, or divests from, persons, not as being specifically determined, but as belonging to certain classes. And the title determines the person to the class.

But though the facts which serve as titles mark the be-

ginnings and endings of rights and duties, it is not (generally speaking) for that reason only that the law imparts to those facts their creative and extinctive effects.

Independently of a given title serving as such a mark, there is generally another reason why it is selected as a title: A reason founded on utility, partial or general, well or ill understood. It is deemed expedient that the given fact should perform the functions of a title, in preference to other facts, which, as mere marks, might perhaps perform the functions equally well. For example: Considering a title as a mere mark determining the commencement of a right, it would be utterly indifferent whether a man's lands and goods passed on his decease to his children or to his remoter relations.

But for certain reasons founded on obvious utility, his lands and goods generally pass to his children in preference to his remoter relations.

NOTES.

Meanings of the word Privilege in English Law.

Privilege never denotes, as it did in the Roman Law, *a law*: It sometimes seems to denote a *right* enjoyed by a peculiar class: In this sense it belongs to the Law of Persons: Sometimes it seems to denote rights enjoyed by the subject against the Sovereign. Origin of this meaning.

[See *ante*, "Liberty;" "Limitation of sovereign power." Monopolies.* *Ante*, "*Jus in re et ad rem.*"]

Remarks on Terms.

Objection to the term "Title," as used by the English Lawyers.

Though it denotes the facts to which the law annexes rights, it does not denote completely the facts through which it determines rights.

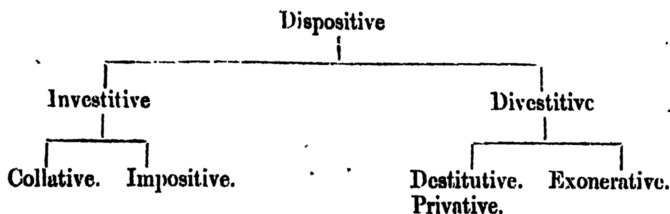
Where the fact which determines a right does not at the same time give commencement to another, the term "title" does not apply to it. Further, it is not applicable to facts as engendering or extinguishing duties, be they relative or be they absolute.

[For another use of the word "title," by English Lawyers, see Table II. *post*.]

The same objections apply to "mode of acquisition." We cannot talk of acquiring a duty. Nor will acquisition apply to the termination of a right or duty. [Mr. Bentham's suggestions; Traités, vol. i. p. 280.†]

* Bentham, Princ.: pp. 229–292.

† "Mr. Bentham's suggestions" are in favour of "une série de mots qui se correspondent; ou un nom pour le *genre*, et des termes spécifiques subordonnés. Prenez le mot *titre*, la ramification logique s'arrête au premier pas. Point d'espèces de titres," etc. The terms suggested by Mr. Bentham are arranged in the following tabular form, in the margin of the book.



Mr. Austin's objection to these terms will be found further on.—*S. A.*

I shall use *title* in the large sense which I have already annexed to the term: *i. e.* as denoting any fact through which the law invests or divests a right, or imposes or withdraws a duty.

Titulus, by Blackstone, denotes divestitive as well as investitive events.

1. *Titulus.*
2. Duration of right (including certainty or continuity of termination).
3. Commencement, whether of right or enjoyment, (and then determination of preceding rights.)
4. Severally and commonly.
5. Extent of right in respect of power of using, deriving services from, or dealing with the subject.

Quære. Whether power of aliening (which as against successors is a sort of annihilation) belong to this, or to duration?

Things, or subjects of rights also considered under this last head.—*Marginal Note in Blackstone*, vol. ii. chap. 23, p. 381.

Terminology.

I shall use indifferently, " mode of acquisition, title, cause, investitive event," etc.: unless I attach specially a more special meaning.*

Various circumlocutions, after the manner of the Roman Lawyers, may also be used. They have no settled generic terms. " Jurium amissionis causæ." " Solutio, extinctio, etc. etc."†

No settled name, in the Roman law, for facts determining rights and duties.

By Roman Lawyers, and in the language of the derivative systems, *titulus* never means a *title* in the sense of mode of acquisition.

The names of *Tituli* ought to be the names of the incidents which give rise to rights and obligations, and not of the rights and obligations themselves, or of their subjects.

" *Titulus* " is applicable to the incidents which give rise to *Jura ad Rem*, as well as to those which beget *Jura in Re*: But is *not*

* Mackeldey, vol. ii. p. 40. † Hugo, Gesch. pp. 249, 576.

applicable to incidents as begetting obligations, whether they be absolute or relative, or whether they correspond with *Jus in Re* or *Jus ad Rem*. Nor is it applicable to incidents which put an end to, or to incidents *as* putting an end to, either rights or obligations. "*Modes in which obligations are extinguished or removed,*" seems to be the only expression in the Roman law for this purpose; and *that* only applies to obligations, *stricto sensu.**

Similar remark made before, about capacities and faculties.

Objections to the term Title in the sense of the English Lawyers;—

1. That though it denotes the incident which gives beginning to a right, it does not denote the incident which puts an end to it, or only by implication; (*con*notes but not *de*notes):

2. That it only connotes the incident as giving origin to the corresponding obligation, and as putting an end to it.

There is the same objection to "Acquisition," or *Modus acquirendi*. In the sense in which the term "*Titulus*" is used by the Roman Lawyers, it denotes, not a mode of acquisition, but a condition necessary to the efficacy of a mode of acquisition: viz. tradition (or rather the incident of which tradition is the evidence). "*Causa remotior: Consideration.*" (See Table II., *post.*)

Another objection to "*title*" (and perhaps to "*mode of acquisition*") is,—that it is partial, even with regard to the incidents which give beginning to rights. It is not applicable to the incidents which give beginning to *Jura ad Rem*. (*Sed Qe.*)

The Roman Lawyers seem to extend "acquisition" to rights *ex contractu* and *quasi ex contractu*, and even to rights *ex delicto*.

Objection to "*investitive and divestitive incidents*"; that in common language "vest," "invest," etc., only apply to vested rights.

"*Modes (or Incidents) in which Rights, and Obligations, begin, and end,*" avoid all these inconveniences; extending even to the obligations which begin in crimes.

Mode, like title or incident, denotes, properly, the fact stripped of its evidentiary and other conditional matter.

* Hugo, Gesch. p. 263. Blondeau, vi.

LECTURE LVI.

Continuing the disquisition concerning Titles in general, which I began in my last Lecture, I would remark, that *titles* (or the facts *through* which the law confers and divests rights, or, *through* which the law imposes and withdraws duties) are divisible into *simple* and *complex*.

A title may consist of a fact which is deemed *one* and *indivisible:* Or a title may consist of a fact which is *not* deemed one and indivisible, but is esteemed a number of single and indivisible facts compacted into a collective whole.*

And here it is obvious to remark, that every title is really complex. In the case, for example, of acquisition by occupancy, (which perhaps is the least complex of all titles,) the title, though deemed simple, consists, at the least, of three distinguishable facts: namely, the negative fact that the subject occupied has no previous owner; the positive fact of the occupation, or of the apprehension or taking possession of the subject; and the positive fact of the intention, on the part of the occupant, of appropriating the subject to himself:—*animus rem sibi habendi.*

Nay, each of the simpler facts into which a title deemed simple is immediately resolvable, may itself be resolved into facts which are still more simple or elementary. The negative fact, for example, that the thing acquired by occupancy is *res nullius*, is the absence or negation of that multitude of facts which are imported by the positive fact of a thing

* Bentham, Traités, vol. i. p. 273.

being owned already. And the fact of the apprehension or taking possession, or the *animus* or intention, on the part of the occupant, *rem sibi habendi*, is also resolvable into a number of facts which it would take a long treatise to distinguish and describe.

Consequently, a so-called *simple* title is a title consisting of parts, which, for the purpose contemplated by the speaker, it is not necessary to distinguish: whilst a so-called *complex* title is a title consisting of parts, which, for the same purpose, it is necessary to consider separately. The terms simple and complex, as applied to titles, are merely relative expressions. For one and the same title as viewed from different aspects, or one and the same title as considered to different purposes, may be simple *and* complex.

If the distinction of titles into simple and complex have any other meaning than the one which I have now mentioned, that other meaning is founded on a difference of degrees.—Though all titles are complex, some are *more* complex than others. And such as are more, and such as are less complex, may be divided loosely into complex and simple, and distinguished by those epithets.

According to Mr. Bentham, in his "*Vue générale d'un Corps de Droit*," the distinguishable facts which constitute a complex title, are divisible, in some cases, into "*principal*" and "*accessory*." Looking at the *rationale* of the distinction which he seems to have in view, (and which is a distinction of great practical moment,) I should think that *essential* or *intrinsic*, and *accidental* or *adventitious*, would be more significant than principal and accessory.

The *rationale* of the distinction appears to be this:

As I remarked in my last lecture, titles serve as signs or marks, to denote that such or such rights have vested in such or such persons; that such or such duties are incumbent on such or such persons; that such or such rights have ceased or been divested, or that such or such duties have been withdrawn or removed. In other words, it is through

the medium of *titles*, (except in the comparatively few, and comparatively unimportant, cases, wherein rights and duties are conferred and imposed by the law *immediatè*, or are divested and withdrawn by the law *immediatè*,) that the respective rights and duties of the several members of the community are distributed or assigned. Setting aside those comparatively few, and comparatively unimportant cases, persons are invested and burthened with rights and duties, or are divested and discharged of rights and duties, not as being determined by their specific or peculiar characters, but as belonging to *classes* of persons. And it is through the medium of the various titles, that they are determined respectively to those various classes.

But, as I also remarked in my last lecture, it is seldom that a right or duty is annexed to a title, or that a right or duty is divested or withdrawn by a title, merely because the title serves as such a mark. For, if the title merely served as a mark to fix the commencement or determination of the right or duty, almost any fact might serve the turn as well as the fact which *is* the title. There are generally certain reasons, derived from the nature of the fact which serves as a title, why such or such a right should be annexed to that fact rather than another, why such or such a duty should be annexed to that fact rather than another, or why that fact rather than another should divest such or such a right or duty.

In short, a title serves to *mark*, that this or that person has been invested or burthened with this or that right or this or that duty: or a title serves to mark, that this or that person has been divested of, or exonerated from, this or that right or this or that duty. But, independently of its use in serving as such a mark, there are generally or always reasons, derived from the nature of the fact which *is* the title, why the given person should be so invested or burthened, (or should be so divested or exonerated,) through, or in consequence of, that very fact.

Now it may happen, that, looking at the reasons or purposes for which a given right is annexed to a given title, *all* the facts of which the title is constituted are of its very essence. In other words, the right could not arise (consistently with those reasons or purposes) through or in consequence of the title, if *any* of the simpler facts into which the title is resolvable were not an ingredient or an integrant part of it.

But it may also happen, that, looking at the reasons or purposes for which a given right is annexed to a given title, one or more of the facts of which the title is constituted are *not* of its very essence. In other words, the right might arise (consistently with those reasons or purposes) through or in consequence of the title, though one or more of the facts of which the title is compounded were *not* constituent parts of it.

For example: Looking at the reasons for which a convention is made legally obligatory, or for which legal rights and duties are conferred and imposed on the parties to the agreement, a promise by the one party, and an acceptance of the promise by the other party, are of the essence of the title.

But, in certain cases, a convention is not legally binding, unless the promise be reduced to writing, and the writing be signed by the promisor: or unless the promise be couched in a writing of a given form: or (generally) unless the contracting parties observe some solemnity which has no necessary connexion with the promise and acceptance.

Now, though the given solemnity, let it be what it may, is, in all such cases, a constituent part of the title, it is not of the essence of the title. For, looking at the general reasons for which conventions generally are made obligatory, or at the particular reasons for which rights and duties are annexed to conventions of a particular class, the right and duty might arise, (consistently with those reasons,) although the solemnity were no portion of the title. The solemnity

may be convenient evidence of that which is essential to the title, but, though it is a part of the title, it is not necessarily such.

Now where the right might arise, (consistently with the reasons for which it is annexed to the title,) though some of the facts constituting the title were not component parts of it, the several facts into which the title is resolvable may be divided into *essential* and *accidental*, *intrinsic* and *adventitious*, or (in the language of Mr. Bentham) *principal* and *accessory*. The facts which are essential or principal are parts of the title, because they are absolutely necessary to the accomplishment of the purposes for which the right is annexed to the title by the lawgiver. But the facts which are accidental or accessory, are constituent parts of the title, not because they are *necessary* to the accomplishment of those purposes, but for some reason foreign to those purposes, or merely to render their accomplishment more sure or commodious.

The distinction between essential or principal, and accidental or accessory facts, may hold in the case of a title which merely imposes a duty, or which divests or withdraws a right or duty, as well as in the case of a title which invests with a right. But, for the sake of simplifying my language as much as I can, I confine myself to titles considered as investing with rights.

Where some of the elements of a title are accidental or accessory, they (generally speaking) are merely subservient to the essential or principal parts of it. For example: They serve as *evidence*, preappointed by the law, that that which is substantially the title has happened. This is the case, wherever tradition or delivery of the subject, or a writing with or without seal, or an entry or minute of the fact in a register, or any other solemnity of the like nature, is a constituent part of a valid alienation of a thing of a given class.

The essentials of the alienation, as between the alienor

and alienee, are a free will and intention on the part of the former to divest himself of the right, and to invest the other with it; an acceptance of the proffered right by the alienee; and some fact, or another, evincing or signifying such intention and acceptance. The tradition, the writing, the entry in the register, or the other solemnity, is merely evidence, required or preappointed by the law, of that which is essentially the title.

Some evidence of the intention and acceptance is indeed absolutely necessary. But evidence other than the solemnity which is a constituent part of the title, (as, for example, a verbal declaration,) might also serve as evidence of the intention and acceptance. The case of a writing, or other solemnity, which is merely preappointed evidence of the facts that are essentially the title, but which nevertheless is a constituent part of the title, shows clearly the nature of the distinction between the essential or principal, and the accidental or accessory parts of a title.

The evidentiary fact is made a part of the title, or is rendered necessary to the validity of the title, in order that that evidence of the substance of the title, which the lawgiver exacts, may be provided by the party or parties with whom the title originates.

The invalidity or nullity of the title, in case the evidentiary fact be not a constituent part of it, is the *sanction* of the rule of law by which the evidence is required. But it is clear that the rule of law might be sanctioned otherwise: and that, if it were sanctioned otherwise, the preappointed evidence, though still requisite, would be no part of the title.

For example: The absence of the given solemnity, instead of nullifying the title, (or being made a presumption, *juris et de jure*, that the title had not accrued,) might be made a presumption *primâ facie:* that is to say, a presumption which the party insisting on the title might be at liberty to rebut, by explaining the reason why the prescribed solem-

nity had not been observed, and by producing evidence, *other* than the pre-appointed solemnity, that the title *had* accrued.

Or the absence of the given solemnity might be visited on the party bound to observe it, not by nullifying his title, but by punishing him with a pecuniary fine.

And, on either of these suppositions, the prescribed solemnity, though still prescribed or exacted, would not be *indispensable* evidence of the *substance* of the title, or (what is the same thing) would not be a *constituent part* of the *whole* title. For, it is manifest, that, wherever an evidentiary fact is indispensable evidence of a given title, *that* evidentiary fact is a component part of the title, although it is not an *essential* part, but is merely an *accidental* or *adventitious* one.

I have said above, that where some of the elements of a title are non-essential, they (generally speaking) are merely subservient to the essential parts of it. In other words, though they are not absolutely necessary to the accomplishment of the purposes for which the law annexes the right to the title, they tend to render the accomplishment of those purposes more certain or commodious. This, for example, is the case, where a solemnity which is merely evidentiary of the title, is made in effect a part of the title, inasmuch as the title is not complete or valid, in case the solemnity be not observed by the parties.

But it not unfrequently happens, that the accidental parts of a title are in no respect subservient to its essential or principal parts. In other words, they are completely foreign to the reasons or purposes for which the right in question is annexed by the law to the title.

This, for example, is the case, wherever a deed or other writing is indispensable evidence of the title, and where moreover the writing is not admissible evidence, in case a stamp was not affixed to it when the alleged title arose. In this instance, the stamp is made a part of the title, not be-

cause it has any connexion with the essentials or substance of the title, but to secure the due payment of a given tax.

And here, again, the distinction between the essentials and the accidentals of the title is glaring and manifest.

The nullity or invalidity of the title, in case the stamp be not affixed when the alleged title arises, is the *sanction* of the law which imposes the tax. But it is clear that the law imposing the tax might be sanctioned otherwise: As, for example, by a fine on the party, whose duty it was, when the alleged title arose, to pay the tax, and to procure the fixation of the stamp to the evidentiary instrument.

In practice, the law imposing the tax is often sanctioned in the manner which I am now suggesting.—Although the duty ought to have been paid, and the stamp affixed to the evidentiary instrument, when, or immediately after, the alleged title arose, still the instrument is admissible evidence of the title, if a *double* tax be paid, and a stamp be affixed to the instrument, subsequently to the time prescribed for those purposes. And, in this case, the payment of the tax, though still requisite, is no *part of the title*.

Before I quit the topic now under consideration, I would remark, that, in many cases, it is not easy to distinguish the essential or principal, from the accidental or accessory elements of a title.

This, for example, is the case, where an accidental element is made a part of the title, because it is deemed commodious *evidence* of the substance or essence of the title. Here, the evidentiary fact is an *accidental* part of the title, not absolutely, but only in a qualified manner. For *some* evidence of the title is indispensable or necessary, inasmuch as the title could not be sustained, (in case it should be impugned,) if *some* evidence of it be not forthcoming or producible.

The preappointed evidence is therefore an accidental or accessory part of the title, not because *evidence* is not essential to the validity of the title, but because evidence of the *class* or *description* which the law preappoints or prescribes,

is not the *only* evidence by which the title might be sustained. The law might leave the parties to provide what evidence they pleased of the title; and might empower the tribunals to admit the evidence provided by the parties, if they deemed it satisfactory. By determining therefore that evidence of a *sort* shall be indispensable, the law adjects to the title an element which is properly accidental or accessory.

And the same may be said of every case, in which a fact of a given *genus* is inseparable from the title, but in which the law determines the *species* or sort.

For example: Assuming that acceptance by the heir is a necessary part of his title to the heritage, but that the law prescribes, under pain of nullity, the form or manner of the acceptance, it is clear that the prescribed acceptance is an accidental part of the title, in so far only as the law determines the *manner* of the acceptance, instead of leaving him to accept it in any manner whatever.

I assume, merely for the sake of example, that the assent or acceptance of the heir is a necessary ingredient in every title to a heritage. In truth, it is not. For, in the earlier Roman Law, there were certain heirs, styled *heredes necessarii*, upon whom the heirship, with the acquittal of the deceased's obligations, was imposed as a duty. Though, afterwards, they were enabled, by taking certain steps, to repudiate the heirship: or, at least, were only bound to acquit the obligations of the deceased, in so far as the faculties or means devolving from him would suffice for that purpose.

[*v. v.* Qe. Whether acceptance by the heir, be, in the English law, necessary?

I should think it is, because, without seisin, which is a voluntary act, he is not heir.

Originally, the seisin was the feudal investiture: the acceptance from the lord of the fee. And to this the heir could not have been constrained.

At all events, he is not answerable beyond assets.]*

* "By inheritance the title is vested in a person, *not* by his own act

I have insisted on the distinction between the *essential* and the *accidental* parts of a title, because they are often confounded. This is particularly the case, as I shall show hereafter, where the accidental parts are merely evidence, predetermined by the law, of that which is substantially the title itself.

I said, in my last lecture, that wherever a right or duty is conferred or imposed by a law *through an intervening or mediate fact*, or wherever a right or duty is divested or withdrawn by a law through an intervening or mediate fact, the right or duty may be said to be conferred or imposed, or may be said to be divested or withdrawn, through, or in consequence of, a *title*: meaning by a title, such intervening or mediate fact.

I also said, that wherever a right or duty is conferred or imposed by a law *without the intervention of a fact distinct from the law itself*, or wherever a right or duty is divested or withdrawn by a law without the intervention of a fact distinct from the law itself, the right or duty may be said to be conferred or imposed, or to be divested or withdrawn, by the law, immediately or directly: or the right or duty may be said to be conferred or imposed, or divested or withdrawn, *ipso jure*; by the act or operation of the law; or by the *mere* act or operation of the law.

And this, I apprehend, is the correct, as it is the obvious, meaning, of all such expressions as the following: namely, "rights and duties *ex lege*;" "rights and duties *ex lege immediatè*;" "rights and duties which are divested and extinguished *lege immediatè*;" "rights and duties which arise, or are divested or extinguished *ipso jure*;" or "which are

or agreement, but by the single operation of law." Blackstone, vol. ii. p. 241.

Differing in this from the Roman heir, whose *aditio* (or some equivalent act) was a necessary link in the chain of title: The English heir (it is presumed) is obliged to repudiate: and quære; the manner of this at Common Law?—*Marginal Note.*

created, or divested or extinguished, by act or operation of law."

But in the language of our own law, and of other particular systems of positive law, these and the like expressions are not used with the meaning, or not used exclusively with the meaning, which is obviously the proper one. In the language of our own, and of other particular systems, they are always or commonly applied improperly: in cases, that is to say, in which the right or duty is not created or divested by a law *without the intervention of a fact distinct from the law itself;* but is really created or divested by a law *through a mediate or intervening fact*: that is to say, through a *title.*

These improper applications of the expressions which I have just enumerated, and of various other expressions of the same purport, may be reduced, I think, to two.

First, in some cases of title, the title, or one or more of the several facts constituting the title, is some *act* done by the person who is invested with the right, who is divested of the right, on whom the duty is imposed, or who is exonerated from the duty. But in other cases of title, neither the title, nor any of the several facts constituting the title, is an *act* done by that person. The will of the person (with reference to all the facts which constitute the title) is perfectly *quiescent:* or if his will be active, it is merely active in the way of forbearance from some given act. Now where the title is in this latter predicament, the right or duty is said to arise, or to be divested or withdrawn, "*lege immediatè*"; "*ipso jure*"; "by act or operation of law"; "by *mere* act or operation of law"; and so on: These and the like expressions really denoting, (*not* that the right or duty is invested or divested without the intervention of *any* title, but) that the title, by which the right or duty is invested or divested, is not any act of the invested or divested person, and does not comprise any act of that same person.

For example: According to the Roman law, heirs of cer-

tain classes, whether they be heirs *ex testamento*, or heirs *ab intestato*, are not heirs completely, unless they *accept* the heritage. And, accordingly, such heirs are styled *voluntary*, or are said to acquire by their own act. But on heirs of other classes, the inheritance devolves, whether they wish it or not, on the decease of the testator or intestate, without an act of their own. And, accordingly, such heirs are styled *necessary*, (or heirs necessitated or obliged to take,) and are said to take the heritage *ipso jure*, or, as we should say, *by mere operation of law.*

Again: Where, according to our own law, a man grants a particular estate (as an estate for years or life) to one, with a remainder over to another, the remainder is said to be created by his own act. But where he grants a particular estate, and does not part with the remnant of his own estate, that remnant is styled a reversion, and is said to arise by the act or operation of law. For though by the grant of the particular estate he does an act, he does no act in respect of the remnant, but the remnant continues in him, or, if you will, reverts to him, through his mere omission or forbearance from granting it away.

Again: According to the later Roman law, the absolute property *rei singulæ* cannot be acquired commonly without an apprehension or a taking possession of the thing by the acquirer: by an apprehension consequent on tradition, in case the thing be acquired through an alienation, or by an apprehension without tradition, in case the thing be acquired otherwise than through an alienation. But, in some cases, property vests in the acquirer without an act of apprehension. And in these cases, the passing or vesting of the property is styled by modern civilians "*transitus legalis*;"* that is to say, it passes by the *law* to the acquirer, without an act of his own, or, at least, without an apprehension by him: without that act of apprehension by him,

* Thibaut, System, vol. ii. p. 32.

which, in the other cases to which the cases in question are opposed, that particular act on his part is requisite.

2dly. Another improper application of the expressions in question seems to be this:

Certain classes of titles, or of modes of acquisition, have *concise* names: as, for example, "occupancy," "alienation," "præscription," and so on.

But other classes having no concise names, and not being expressible without long circumlocutions, they are commonly lumped up together, and opposed to the classes which have such names, by the expression "*ex lege*," "*ex lege simpliciter*," "*ex lege immediaté*," etc. This, at least, appears to be one of the meanings which are annexed by the Roman lawyers and the modern Civilians to such expressions as "rights and duties *ex lege*," "*ex lege simpliciter*," and so on.

3dly. There is perhaps a third improper meaning of the expressions which I am now examining.*

"*Operation of law*," in some cases is a merely negative expression: denoting that the party acquires without an act of his own. But where parties contemplate and embrace consequences preappointed, these can hardly be said to arise without an act of their own.

* Bentham, Traités, vol. i. p. 287.

LECTURE LVII.

[The following Lecture is the last given by Mr. Austin at the London University. It was delivered on the 26th of June, 1832, after which he was compelled by ill health to terminate his course abruptly, and go abroad.

He had begun to write the lecture, but could get no further than these notes, which, as the reader will see, are but suggestions for his spoken discourse.

There remains a mass of papers containing heads of the subjects which he had treated, or which he intended to treat. It has not been thought expedient to print them. I have, however, made an exception in the case of the Notes "on Contracts and Quasi-Contracts," which evidently were intended to form the groundwork of the next Lecture. They are referred to at p. 121.—*S. A.*]

In my two last Lectures, agreeably to the order which I announced in the Lecture preceding them, I submitted to your attention certain remarks applicable to titles in general.

I now proceed to certain leading divisions of the titles which properly belong to the department of the Law of Things, through which I am now travelling: namely, the titles by which rights *in rem*, considered as existing *per se*, are acquired or lost, or invested and divested.

But even in considering these titles, I shall be obliged to advert occasionally to titles of other classes.

These various divisions are disparate and cross. They are various attempts to find a basis for a classification or arrangement of the various genera and species of titles. I

am not certain that any such is practicable or useful:—whether it be not better to select the principal titles, and then to add a miscellany—*ex lege*.

This is the case in Blackstone, 'the French Code,' Ulpian, Bentham. In none of these is there any attempt to reduce in the first instance the whole mass of titles into two, three, or some small number, of very extensive genera, and then refer the various subordinate genera and species to them. They begin by placing on a line a considerable number of genera which are comparatively narrow: and perhaps eke out these by a miscellaneous head.

The great difficulty is the mixed character of most of the titles which in every system occur.

Titles ex Jure Gentium and ex Jure Civili.

Modes of acquisition *ex jure civili* are many of them not peculiar, but are merely peculiar modes of modes which may be deemed universal: modes accompanied by peculiar formalities.

(Heineccius, lib. ii. tit. i.–vi.)

Inconvenience of the division into titles *ex jure gentium* and *ex jure civili* as a basis for a classification.

The arrangement of titles in Gaius and the Institutes, mainly founded on this division.

(See Gaius, lib. ii. Inst. lib. ii.)

Absurd mode in the Institutes of placing servitudes between these two sorts of titles; servitudes being *ex jure civili*.

Acquisitions *per universitatem* are not included under either department.

But the distinction between prætorian and civil law does not quadrate with the distinction in question.

The only practical consequence of the distinction (as I have remarked already,) applies to crimes *juris gentium* and crimes *jure civili*.

Original and Derivative Titles.

Import of the distinction. Its inconvenience as a basis for a classification of titles. Would separate modes of acquisition which it is convenient to consider together; as, *e.g.*: occupation of a subject *nullius*—or by dereliction.

Succession not co-extensive with derivation. As, *e.g.*: in the case of constitutive alienation. So in the case of commixtion, specification, etc.

Succession sometimes means succession to the dead, *ex testamento* or *ab intestato*.

Investitive events are original or derivative: *i. e.* acquired from the State directly, as in cases of occupancy; or from or through a person in whom a right or its subject formerly resided.

The distinction appears to be confined by some to rights *ex jure gentium*:

By others, to acquisitions of *dominium* or property, pre-eminently so called, and other *jura in rem*. But is just as applicable to *jus in personam*: *e.g.*: Assignee of a contract: Succession by heir to rights *in personam* of deceased.

The distinction appears to be useless, except for this purpose: that in many cases of derivative titles, the party is subject to duties passing from the party from whom his right is derived.

Attempts at Classification.

Title by descent and title by purchase.

A convenient division in the Law of English real property, for reasons given by Christian and Blackstone.* But a division only of one class of rights: rights *in rebus singulis* falling under the law of real property.

It would not be a convenient basis for a general division:

* Blackstone, vol. ii. pp. 200, 241–3.

And, accordingly, modes of acquiring personal property are not divided in that manner.

It is not complete, even with reference to real property.

Having suggested certain of the leading divisions of the titles by which *jura in rem per se* are invested and divested, I shall now proceed to consider *seriatim* certain of their classes.

These classes are, in every system, extremely numerous: So numerous, that only some, and perhaps a comparatively few, have gotten concise names. Whence, as I remarked before, the expression "*ex lege*";—analogous to "*variis causarum figuris*" in cases of obligations.

I shall only consider such, as, in some form or other, occur in all or most systems; and of these, only the more important.

I shall consider them, principally, as they regard absolute property.

In treating them, I shall abide as far as possible by Thibaut's division; *i. e.* shall consider first, the one-sided titles (or not alienations *sensu stricto*). For these I shall compare Mühlenbruch, Mackeldey, Thibaut, Blackstone, Bentham, and others.

*One-sided Modes of Acquisition, and Two-sided.**

This seems to be substantially a division into alienation (strictly so called), and all other modes of acquisition.

It does not quadrate with original and derivative, or *jus civile* and *jus gentium*.

Mühlenbruch's division MS. (see Table, in Vol. II. p. 245)* is bottomed on the division of titles into such as are *ex jure civili* and such as are not.

* Thibaut, System, vol. ii. p. 32, etc.

Occupancy.

Occupancy is only a species of appropriation: (*Sed qe.*)—In case of the acquisition of a servitude, etc., prescription must combine with appropriation.

Occupancy, what. Occupancy of *res nullius*, and adverse occupancy of *res alicujus*. Physical and legal possession.

(To be examined particularly under "Right of possession.")

Distinguish between physical occupancy, (or putting a thing to any of the uses of which it is susceptible,) and legal occupancy.

Remark on the talk about occupancy being the origin of property, etc.

(Blackstone, vol. ii. chap. i. p. 9.)

Why it ought to give a right.

(Bentham, vol. ii. p. 110.)

Where society and law are established, the original reasons in a great measure cease. It is then little more than a mark. And this is a reason for carrying over to the fisc, or to private persons determined in the way of devolution.

Alienation.

Essentials of an alienation.—Voluntary transference.—Acceptance of transfer:—*Causa* or inducement being implied.

Voluntary alienation opposed to involuntary, as meaning alienation compelled by law. The latter would come under the head of "adjudication."

The various modes of alienation, are merely evidentiary.

* A copy of this Table, taken from the margin of the page in Mühlenbruch cited in the text, will be found at the end of this Lecture. The matter of which it is a condensation extends over seventeen pages.—*S.A.*

Solemnities adjected to alienations:

1st. For the protection of the parties to the alienation: A doctrine including the doctrine of evidentiary instruments, and the doctrine of Considerations.

2ndly. For the protection of strangers to the alienation: A doctrine including that of Registration. See *post,* "Contracts," "combinations of *jus in rem* and *in personam,*" "evidence."

Limits to the application of registration and of other precautionary solemnities, arising from the nature of the subject.

Many remarks touching solemnities adjected to alienations apply, *mutatis mutandis,* to solemnities adjected to other titles.

Where *Jus in Re* passes by *tradition or delivery,* the *titulus* or investitive incident consists: First, in an intention on the part of the alienor to alien; secondly, in such a *causa,* consideration, inducement, or motive to or for the alienation, as the law holds to be just or sufficient.

The tradition is *merely preappointed evidence of the titulus;* though in consequence of its being esteemed necessary evidence, it is often treated as part of that *titulus* (or as a mode of acquisition superinduced upon it,) and is sometimes (for that reason), *feigned* to have taken place.

Instances in which property passes by force of the *titulus,* evidenced through some declaration of intention *other than* tradition, actual or symbolical.

The *Causa* or consideration may be insufficient to sustain the disposition *as against the alienor* himself (*e.g.* fear of violence; fraud; which last may vitiate a consideration otherwise good): Or *as against third parties* (*e.g.*: a gift, as against creditors).

Tradition seems to have been confounded with *Modus acquirendi,* on account of its having been preappointed and *conclusive* evidence of *titulus;* until (with the advance of

civilization,) the real nature of the transaction came to be scrutinized.

Same virtue attributed to the English *feoffment* and *livery*. (Blackstone, vol. ii.)

Absurdity of presuming, not the *titulus*, but the tradition to be the evidence.

Evidentiary Instruments and other forms. Interpretation of, etc.

Preappointed evidence; actions, etc.; general notions of, as preliminary to dispositions.

Registration.

(To be postponed to the end of prescription.)

Limits to the application of registration, arising out of the nature of the subject.

Disposition.

"Disposition" may be conveniently used as a generic expression for any act by which a person assumes to transfer, or promises to transfer, his real or assumed Right, or any part of it, to another. The species will be Voluntary Alienation and Contract.*

Dispositions of which the consequences are predetermined (by the law) absolutely: and those of which the consequences (subject to restrictions,) are left to the will of the parties. In which last case, consequences (to take effect in default of expressed intention by the parties,) are marked out by the law or not.

Dispositions are *valid or invalid*:—If valid, the *consequences* are predetermined by the law, or they are left to the appointment of the parties:—If left to the appointment of the parties, *provisional dispositions* (dispositions to take effect in default of such appointment) are laid down, or not.

* See list of alienations, contracts, and combinations of both, in Bentham, Traités, etc., vol. i. p. 390.

If there be no appointment by the parties, where there are such provisional dispositions, these take effect—1st: Either because they may be presumed to have been intended; or, 2nd: Because they are the best—generally speaking—that the parties could have made; or, 3rd: Because it must be presumed that they did not intend nothing, and here is a something which they might have meant. On the first and third suppositions, these provisional dispositions are indeed nothing more than dispositions of the *parties* (tacitly referring to consequences which they mean to adopt, and) which, by reason of known rules of law, it is not necessary to express. If there be no intelligible appointment by them, nor any in their default, the transaction is without effect.

By reason of the invalidity of certain dispositions, and of the necessity of making provisional dispositions, a large space is in every Law occupied with them. See "Combinations of *Jus in Re*," etc.

Termination of Rights.

The modes in which *jura in rem* terminate, are not described in the Institutes of Gaius or those of Justinian.

It is necessary to describe the end explicitly and apart, only in those cases in which the end is not involved in a mode of acquisition.

(*Dereliction.* See Blackstone, vol. i. p. 9; Mühlenb. vol. i. p. 236; Hugo, G. p. 238; Mackeldey, vol. i. § 186; vol. iv. cap. ii. § 272.)

Jura in Re are further divisible into—

1st. Such as are available against all the world (or against men indefinitely and without exception);

2. Such as are available against all the world with certain definite exceptions. The first of these is also called Property: The second, Possession (must be distinguished from possession, *titulus*); and is to property in the last sense, what property saddled with a *servitus* is to *jus in re* unsaddled with a *servitus*. Under this, therefore, may be

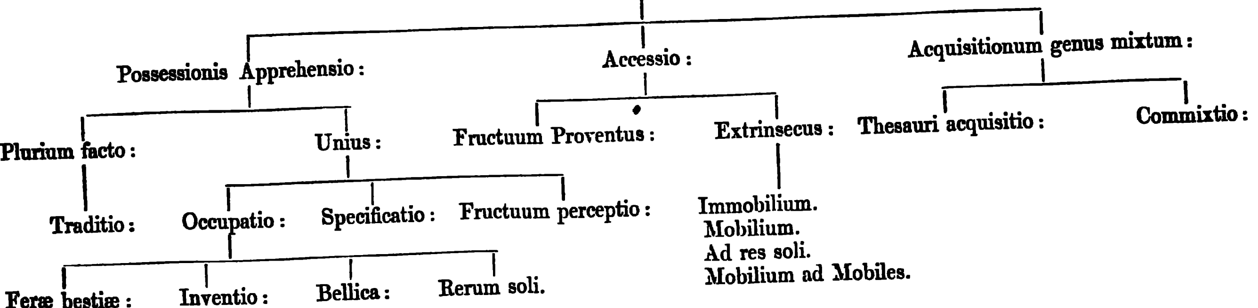
included the *jus in re* acquired by a purchaser in Equity, as against all subsequent purchasers *with* notice; or rather as against *all* mankind except a purchaser *without* notice, etc.

List of Authorities referred to in this Lecture.

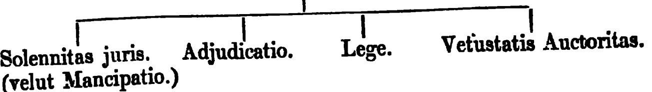
Blackstone.
French Code.
Mackeldcy.
Mühlenbruch.
Hugo.
Bentham.
Thibaut.
Heineccius.
Gaius.
Institutes.
Table II. (*post.*)
Falck.
Savigny.

Table copied from the margin of Mühlenbruch, vol. ii. p. 245, cap. 2: De Dominio.

Acquisitiones ex jure gentium.



Jure civili.



Lege simpliciter.



FROM "LOOSE PAPERS,"

*containing Heads of Lectures or Sections.**

CONTRACTS.

In the proper sense of the word, a Contract is a *promise*, and begets only *jus ad rem* against the promisor: *i. e.* a right to an act, an endurance, or a forbearance on his part.

(Gaius, lib. ii. § 85. Traités, etc., 272, vol. ii. p. 165. Table II., *post*, last note.)

Confusion of incidents which are not promises, or not purely so, with Contracts.

Consequences expressed by parties, and consequences annexed by law in default of such expression.

Consequences of Contracts upon third persons.

In the language of the English law, "Contract" is often limited to *mutual* promises; Bond and Covenant being the names applied to unilateral contracts.

(Bentham, Traités, etc., vol. i. p. 289, and Fragment on Government.)

Covenant, in the Roman Law, a generic expression; in the English, the name of a species.

(Hobbes, Leviathan, chap. xiv.)

Bond, which etymologically is equivalent to obligation, is the name of a species of unilateral contracts, or rather perhaps, of a formality necessary to the validity of it.

* See p. 116.

Nominate and innominate Contracts.

Most nominate contracts appear to be improper contracts: *i. e.* not to be productive of *Jus ad rem* purely.

Pollicitation.

Why a promise is binding (abstraction made of the interests of third parties). It binds, on account of the expectation excited in the promisee. For which reason a mere pollicitation (that is, a promise made but not accepted) is not binding; for a promise not accepted could excite no expectation. So of a promise obviously made in jest.

In enforcing contracts, the expectations of both parties must be looked to. Where the terms are expressed in writing, their common agreement, contemplation, expectation (*i. e.* of the burthen undertaken by one, and the advantage expected by the other,) is to be collected from that.

In the Stipulation, the sense in which each party contracted was expressed apart, in order to render a doubt impossible.

Where language is not employed, the common meaning of the parties is collected from the peculiar facts of the case, and from the consequences attached by the law (or usage) to contracts of the sort. Which consequences are either positive or dispositive: *i. e.* to take effect whether the parties wish them or not, or in default of their making other provisions of their own. And in either case they must be understood to contemplate these consequences.

Solemnities annexed to Contracts.

Their ends, as regards the parties, are two. 1. To provide evidence of the existence and purport of the contract, in case of controversy. 2. To prevent inconsiderate engagements.

Many of these solemnities answer (and were intended to answer) both purposes, such as Bond, Covenant, Stipulation, etc. Others answer (or were only intended to answer) one. Such as the writing required by the Statute of Frauds.

Distinction between such solemnities as are merely evidence of *a* contract; and such as are evidence of *a* contract and of its *terms*.

Earnest, for instance, is merely evidence that a contract was made; its subject, its terms, etc., must be established by evidence *aliunde*. A bond, etc., perpetuates these last. So a Stipulation was evidence of the promise and of the terms.

In *Unilateral Contracts*, inconsiderateness is prevented by the unusual solemnity of the evidentiary incident annexed:—*E. g.* the sealing of a bond or covenant, the interrogation, and answer in a Stipulation.

In *Bilateral Contracts* (by the Romans termed "consensual," by the English "parol"), it is supposed to be prevented by the mutuality: each party contracting for his own pecuniary advantage; contemplating a *quid pro quo;* and therefore, being in that circumspective frame of mind which a man who is only thinking of such advantage naturally assumes. This solution will not indeed apply where the *Consideration* is past, or of small amount; but that this is only an inconsistent application of the doctrine, and that it arose out of the principle suggested, is clear, from the considerations afterwards suggested.

By *consensual* is meant, resting upon consent without solemnity; by *parol*, contracts which are not evidenced by writings in a certain shape and accompanied by certain solemnities.

In consistency with the *principle*, the doctrine of Lord Mansfield and Wilmot (in 3d Burrows, 1665,) is the just one. The contrary opinion, however, is consistent with the actual law. To require *quid pro quo*, where a solemnity analogous to that of a bond intervenes, seems to be absurd.

The doctrine of Lord Ellenborough, that "there must not only be a consideration, but that it must be stated in the evidentiary instrument,"* is pushing the deviation from the principle still further. (*Sed qu*.)

* Wain *v.* Walters, 5 East 10.

Quære: Whether, in cases of pure contract, the solemnities in question are ever intended for, or are applicable to, the protection of *third persons?*

In cases of mortgage, etc., Registration is applicable and applied; but only in respect of the subject over which the *jus in re* is given.

Since a contract gives no *jus in re*, registration, *as regards the subject*, could be of no use; for as the party who contracts to dispose of that subject may, if the transaction be really a contract, aliene to another before completion, and that other can retain (even with notice), registration would be nugatory. It is only where the other could not retain as against the former party, that registration is of use. By declaring that he shall retain, (if there be no registry or notice in some other way,) you make the right of the first acquirer conditional. But in the case of contract, he has no right, conditional or unconditional, as against third persons; and therefore, third persons need not any such precaution.

Contracts in Equity, which give *jus in re* as against all who have real or constructive notice, are, as against all such persons, alienations; though only contracts as against others. So far, therefore, as regards contracts, registration could be of no use, but in respect of the *person* of the contracting party. By knowing the nature of a man's engagements with others, I may make a guess at his ability to fulfil such as I may think of entering into with him. This, in case of *partnership*, has taken place to a certain extent. But it seems to be of limited application.

The absence or presence of Consideration, how it affects third persons (as creditors or other claimants against the general means of the obligor).

Its absence as affecting third persons need not be considered where the contract is unilateral, and is not accompanied by such solemnities as are necessary to make unilateral contracts binding on the *promisor*. Not being bind-

ing on *him*, it is of course, and *à fortiori*, not binding on those who acquire rights from him.

But unilateral contracts, which would bind the promisor, are often void as against third persons, because they are without consideration; *i. e.* without valuable consideration; for, as we have often observed, *no* promise or act is without a consideration, inducement, or motive *of some sort.*

Analyse the different motives; and show why a promise made for other than a valuable consideration, is not, and ought not to be, good against those who have acquired rights out of transactions founded on such consideration.

Difference between the intensity of the expectations.

Danger of fraud. Danger of what would have the same effect, if rights acquired for valuable consideration could be defeated wholly or partially by inconsiderate engagements. Postponement of the claims of the industrious to those of the idle.

Difference between vicious consideration and want of consideration.

Where the consideration is vicious, the contract begets no obligation. Where there is a want of consideration, there is an obligation against the contracting party, provided certain solemnities are observed. "Want of consideration" is an elliptical or abridged expression for "want of *valuable* consideration."

Why a contract (strictly so called) gives no right in re *as against third persons, whether of property or right of possession.*

The principle seems to be this: that for want of sufficient publicity (or what is deemed sufficient), the right of the obligor over the subject, and consequently his power of disposition, are, apparently, unaltered: the contract is not generally known. Third parties, therefore, afterwards acquiring by alienation (to which more publicity is, or ought to be, attached), would be disappointed in their well-founded expectations, if their right could be defeated by a right arising out of a transaction of which (as is assumed) they

had no, or very inferior, means of ascertaining the existence.

Upon this principle, a transaction accompanied by such evidentiary solemnities that at law it would be merely a contract, is, in equity, an alienation (*i. e.* gives a *jus in re* which may be classed with rights of possession,) against all who do not afterwards acquire by a conveyance without notice of the contract. Equity looks at the *purpose* of the solemnity which is attached to a conveyance. That such solemnity imparts a knowledge of the disposition to third persons, is merely a presumption; that in the absence of it no such knowledge is imparted, is also a mere presumption; and since this limited presumption will not hold if there be evidence *aliunde* (*i. e.* either actual evidence, or *presumptio juris* of another sort—constructive evidence), that such knowledge was had, Equity, in these cases, (whether usefully or not, is a question,) overrules the presumption, and gives the subject to the obligee, as against all who are proved to have had that notice which (for want of a conveyance) it is only *presumed* that they had not.

Cases in which Equity does not give jus in re *against acquirers with notice, but defeats an existing* jus in re *in favour of acquirers without notice. This is also resolvable into principles of evidence.*

Where the contract is accompanied by some incident which is presumed to give general notice of the disposition, it changes its character and becomes an alienation, *e. g.* a sale with delivery, actual or symbolical.

In these cases, there is *jus in re* given to the obligee (*i. e.* a power of making a valid disposition, and of retaining as against the obligor or subsequent acquirers from him), though for many purposes (such as that of rescinding the disposition and recovering the equivalent—charging the obligor with the loss of the subject, etc.), the contract is still *in fieri*, as between obligor and obligee. Stoppage *in transitu* is a good illustration. The disposition as an *alienation* being incom-

plete, the seller, by preventing its completion, prevents the right of the creditors from attaching.

Wherever a disposition gives *jus in re* (*i.e.* a right on the part of the vendee or those who take from him, against acquirers from the vendor) the disposition is manifestly an alienation. If it be not, there are no means of distinguishing the one from the other. The ambiguity in truth arises from a very gross mistake, viz.: *confounding evidentiary incidents with dispositions.* Because certain incidents at law give no *jus in re*, (and *therefore* are contracts), *ergo*, the dispositions clothed with these incidents are still contracts, though in Equity they have a different effect.

Quasi-Contracts and Quasi-Delicts.

Strictly, Quasi-Contracts are acts done by one man to his own inconvenience for the *advantage* of another, but without the authority of the other, and, consequently, without any promise on the part of the other to indemnify him or reward him for his trouble. **Quasi-Contracts strictly, what?**

Instances: *Negotiorum gestio*, in the Roman Law: Salvage, in the English.

An obligation arises, such as *would have* arisen, had the one party contracted to do the act, and the other to indemnify or reward. Hence the incident is called a "quasi-contract;" *i.e.* an incident, in consequence of which one person is obliged to another, *as if* a contract had been made between them.

The basis is, to incite to certain useful actions. If the principle were not admitted at all, such actions would not be performed so often as they are. If pushed to a certain extent, it would lead to inconvenient and impertinent intermeddling, with the view of catching reward. Whether

it shall be admitted, or not, depends upon the nature of the act:—*i.e.* its general nature; since without a general rule, the inducement would not operate, nor would the limitation to the principle be understood. Acts which come not within the rule, however useful in the particular instance, must be left to benevolence incited by the other sanctions.

(See "Sanctions," *post.*)

But quasi-contract seems to have a larger import;—denoting any incident by which one party obtains an *advantage* he ought not to retain, because the retention would damage another; or by reason of which, he ought to indemnify the other. The prominent idea in quasi-contract seems to be an *undue* advantage which would be acquired by the obligor, if he were not compelled to relinquish it or to indemnify.

Quasi-delict:—an incident by which *damage* is done to the obligee (though without the negligence or intention of the obligor), and for which damage the obligor is bound to make satisfaction.

It is not a delict, because intention or negligence is of the essence of a delict: it being useless to apply a sanction where the will is passive.

The distinction between quasi-contract and quasi-delict, seems to be useless. In neither case is there either contract or delict. They are merely arranged under these heads, because there is an obligation (*stricto sensu*), as there would have been if there had been a contract or a delict.

Therefore *one fiction suffices*; and the rational way of considering the matter is, to look at the *incident* as begetting an obligation; and to treat the *refusal* to make satisfaction, or to withhold the advantage, as a delict: *i. e.* as a breach of that obligation.

The terms are merely a sink into which such obligatory incidents as are not contracts, or not delicts, but beget an

obligation *as if, etc.*, are thrown without discrimination. And this is the rational view which Gaius has taken of the subject, in a work from which an excerpt is contained in the Pandects.

Note.—Many incidents which are treated as quasi-contracts or quasi-delicts, are, in truth, contracts or delicts; or need not be thrown into this common receiver, because they may be treated of conveniently elsewhere. Examples: 1°. The refusal to pay money received under a mistake, appears to be, not a quasi-contract, nor a quasi-delict, but a delict; there being intentionality. 2°. *Evictio*, which is a tacit contract. 3°. The obligation of the *hæres* to pay legacies; which it is absurd to refer to a quasi-contract, and not to the will, etc.

In the English Law the above terms do not occur; there the obligation is said to arise out of a contract or promise which the law implies. But the fiction is the same.

Demand necessary to support an action on jus in re.

If there be no delict without intention or negligence, quasi-delicts (like quasi-contracts) are merely sources of obligations, the *refusal to fulfil which* is properly the cause of action. Thus, the fact of my having received money through a mistake, is not a delict; but begets an obligation to repay that money or an equivalent. And the refusal (express or indicated by conduct) to repay, is the immediate cause of action: *i. e.* is a delict.

(*Qu^e*. Or the action may be considered a vindication.)

In those cases in which a consideration has *failed*, there is a breach of accessory contract.

So, if I refuse to make compensation for damage done by my servant (without intention or negligence on my part) there is a delict: but, before refusal, an obligation to make such compensation. (Qu°. Whether demand be necessary to sustain the action?)

It would appear, therefore, that every Right of Action arises out of a delict: *i. e.* a violation of some positive or

negative obligation: And all such obligatory incidents, as amount to a cause of action without demand and refusal, are not quasi-contracts or quasi-delicts, but breaches of contract or violations of *jus in re*.

In quasi-contract, the prominent idea seems to be the advantage derived by the obligor (though inconvenience must, of course, have been sustained by the obligee).

In quasi-delict, the prominent idea is the damage suffered by the obligee; any advantage which may have accrued to the obligor being accidental to the cause of obligation. But in many cases the advantage and damage so suppose one another, that it is difficult to determine the class. As *solutio indebiti*. Hence "*ex variis causarum figuris*."

If the terms are to be retained, it would be better, perhaps, to limit "quasi-contract" to incidents in which a service has been rendered by the obligee, and on which, therefore, it may be presumed that the obligor (if conscious and capable of contracting) would have purchased the service by a promise to requite, etc. And to call all other incidents "quasi-delicts."

Note.—Wherever there is a promise, express or implied (*i. e.*: to be inferred from the words, or from the position, or conduct of the obligor, previous to the completion of the obligatory incident), that incident is not a quasi-contract, but a genuine contract. And wherever there has been negligence or intention, immediate or remote, on the part of the obligor there is a genuine delict. It would seem, therefore, that damage done by the intention or negligence of servants, by vicious cattle, etc. of the obligor, ought to be rather ranked with delicts: for there is a degree of negligence in employing such servants, or in keeping such cattle, etc. In short, where the damage is not the consequence of some incident which prudence could not prevent, there is always room for applying a motive to the will; and, therefore, the incident may be classed with delicts.

(See "Sorts of Civil Injuries," *post.*)

Limiting quasi-contract to services without instance and promise, and quasi-delict to damage without intention or negligence, immediate or remote,—there seems no reason for the use of the two terms; either being alike applicable by the same analogy: *i. e.:* an analogy not of obligatory incidents, but of consequent rights and obligations. Neither a quasi-contract nor a quasi-delict is like either a contract or a delict; but the *consequences* of *either* of the former, are like the consequences of *either* of the latter; *i. e.* in begetting *jura ad rem.*

Blondeau seems to mistake the meaning of quasi-delict. The cases which he has cited as quasi-delicts are delicts: for there is intention or negligence. Quasi-delicts, in truth, are not *violations* of rights at all; but sources of *jura ad rem,* the refusal or omission to satisfy which is a delict.

If an incident beget *directly* an action, it should clearly be ranged with delicts, and not with quasi-contracts or quasi-delicts.

Perhaps all incidents not contracts, which imply neither negligence nor intention on the part of the obligor, but which yet beget an action without refusal or omission to satisfy, etc., should be called quasi-delicts, being like delicts in *directly* begetting an action, but unlike them in respect of the absence of negligence and intention.

And all incidents not contracts, which imply neither negligence, etc., but which only beget an obligation, the refusal or omission to satisfy which is the direct cause of action, should be called quasi-contracts: they being like contracts (rather than delicts), inasmuch as they engender an obligation which in itself supposes no right of action, but only begets an action on *breach.*

If this be so, quasi-delicts should be classed with "Sanctionative Rights and Obligations."

(See "Delicts," *post.*)

Gaius makes no distinction between delicts and quasi-delicts, though he adverts to quasi-contracts.*

Quasi-contracts and quasi-delicts, are not the only cases in which the name of one incident is extended to another, by reason of a resemblance between the rights and obligations which they respectively engender. Another instance, is the extension of the term "purchasers for valuable consideration," to certain parties who are entitled under marriage settlements.

The confusion entirely proceeds from the want of a generic expression by which these incidents can be bundled up together.

And note; the same want, instead of leading to the extension of a narrower, sometimes leads to the limitation of a wider: as in the instance, *Rights arising by operation of Law;* as if all rights did not so arise, and as if it were possible to distinguish this narrower class of rights by a term which is common to all.

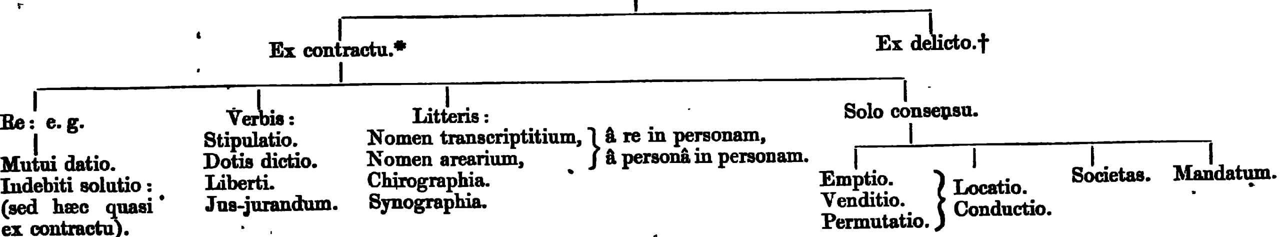
Tendency to confound tacit contracts with quasi-contracts.

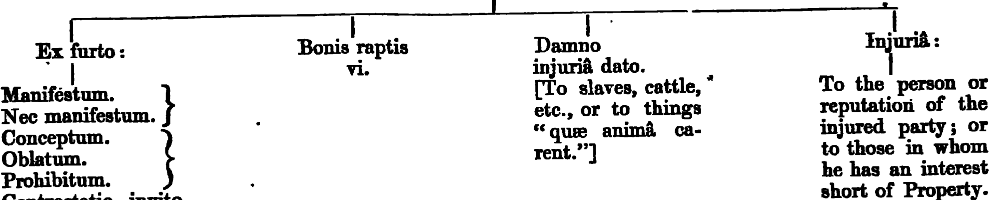
(Give instances:) This confusion is more likely to arise amongst English lawyers than others, on account of their wanting a generic name (which, bad as it is, the Romans have) for marking this sort of obligatory incidents.

Origin of the classification of spontaneous services, and of damage without intention, etc., with contracts and delicts.

1st. The want of generic names.

2nd. The extension to the former of the remedies previously annexed to the latter.





* 'Contract' here comprises quasi-contract.

† "Delict" (though it sometimes means any culpable act or omission) is commonly confined to violations of absolute rights (*jura in re*) in the largest possible sense.

TABLES AND NOTES.

In the Preface to Vol. I. (p. xxxiv) of this work I mentioned the Tables which Mr. Austin drew out and distributed to the members of his class. I also gave, in his own words, his account of them, and of his purpose in constructing them. I added, that they were lamentably incomplete, but that I was not without a faint hope that some of the materials destined for the construction of the missing Tables might be found among his papers. I have clung to this hope with a tenacity which there was little to justify; but after the most minute search and anxious inquiry, I am compelled to relinquish it.

Notwithstanding the incontestable value of the following Tables and Notes, it is not without infinite pain that I submit them to the public in their actual state; especially since I have the full persuasion that some at least of those which are wanting were either prepared or in course of preparation. As I always corrected the press with him, I ought to be able to recollect exactly what were printed. But several circumstances, which, for his justification, it may not be impertinent to mention, tended to efface any distinct memory of them from my mind. After the close of his Lectures in 1832, he was in such a state of suffering and depression that my only solicitude was to keep everything out of his way that could remind him of his abortive projects and frustrated hopes; and I carefully avoided all mention of his Lectures. The copies of the Tables, excepting the few he had distributed, were left in the hands of the printer, and remained there till very recently.

In the Preface to Vol. I., I have mentioned the several occupations in which Mr. Austin engaged. To these successively he devoted all the time and thought of which incessant attacks of illness left him master; and after eight years passed in a fruitless and exhausting struggle, he was compelled to abandon it, and to seek some mitigation of his sufferings abroad.

Thus, there never was a time at which he could have been urged to complete this laborious work with the smallest chance

of success. Nor was it ever alluded to, till within the last few years, when he could talk with calmness of his failures and disappointments. He one day said to me, "I have been looking over those Tables of mine, and I may say to you that I am really surprised at my own work." And he went on to describe what had excited in him the rare emotion of self-applause. Thus encouraged, I did venture to express my ardent desire that he would finish them, and return to the work in which he acknowledged his own mastery. But he only replied, "It is too late—At that time I had it all before me. The time is over. Besides, who would care for them?"

This was the last, I believe it was the only time, we ever spoke of them, and it was decisive.

And thus, after the lapse of thirty troubled years, I can do nothing but either suppress what competent judges deem so conclusive a proof of his ability and learning, (and what, above all, he himself thought admirable,) or give the fragments which exist of the complete structure he had planned.

It appears clear, from the numerous references to them which will be found in the following pages, that the missing Tables were in existence. Whether any manuscript was left in the printer's hands, and, in so long a lapse of time, destroyed, or whether he himself, dissatisfied, as he was so apt to be, with what he had done, destroyed it, it is impossible for me to conjecture. I have carefully examined every portion of the manuscripts. I find a great number of notes which were probably intended to be used in the completion of this work, but nothing that can be applied to that purpose by any hand but his.—*S. A.*

NOTES TO TABLE I.

[Note 1.] See GAII *Institutionum Commentarii* IV; ULPIANI *Libri Regularum Singularis Fragmenta*; JUSTINIANI *Institutiones* ("ex omnibus antiquorum Institutionibus, et præcipue ex Commentariis GAII tam *Institutionum* quam *Rerum Quotidianarum*, aliisque multis Commentariis, compositæ").

The Arrangement of Justinian's Institutes (or, rather, of the earlier Institutes from which they were copied or compiled), is a *systematic*, or scientific, one: that is to say, derived from distinctions lying in the *matter* of the treatise. Thus, the Roman Law (the matter of the Institutes) is divided, in respect of its *sources*, into Written and Unwritten, etc.: in respect of its *subjects*, into Law of Persons (i. e. *special* or *particular* law), Law of Things (i. e. the *general* law of *substantive* rights and obligations), Law of *Procedure*, etc. But the Arrangement (if such it can be called) of his Code and Digests, is an *historical* one. Instead of being founded upon distinctions lying in the *matter* of the compilations, it was taken from a circumstance purely extraneous and accidental: namely, the order or series (consecrated by reverence for antiquity), in which the various branches of the Roman Law had been modified, as occasion prompted, by the Edict of the Prætors. See the Constitution "De Conceptione Digestorum," in which the Emperor instructs Tribonian "in libros et titulos materiam *digerere*, tam secundum Nostri constitutionem Codicis, quam EDICTI PERPETUI *imitationem*." It is scarcely necessary to add, that each of these clumsy compilations is the merest chaos.

In the Table here submitted to the reader (which has been abstracted from the three treatises mentioned above,

and also from the corresponding portions of the Digests or Pandects), the *terms* of the *Classical Jurists* are given exactly. With a view to the study of these admirable writers (who are incomparably the best teachers of the Roman Law), this is a matter of the highest importance. Such a multitude of new, and, in some respects, preferable expressions, has been imported into the system by the later Civilians, that those who have only studied it in the writings of these last, scarcely know it again when they mount to the original sources.

[Note 2.] For the distinction between *Jus publicum* and *Jus privatum*, see Inst. Lib. i.—Tit. i. § 4.—Dig. Lib. i.—Tit. i. frag. 1. § 2.—And see below, Note 8. It seems that the Elementary writers commonly confined themselves to the latter. For Justinian's Institutes briefly *indicate* the distinction, and then immediately subjoin "*Dicendum* est *igitur* de jure privato."

[Note 3.] The Arrangement of Private Law exhibited in the Table above, is formally announced by Gaius (Lib. i. § 8. "De Juris Divisione"), and also by Justinian (Inst. Lib. i. t. 2. § 12): And, in spite of the opinion now prevalent in Germany (see Tab. III.), it seems to be the arrangement which they intended and actually observed. Their adherence to it may be traced in the Institutes of Gaius, and is obvious in those of Justinian.

Compare the following places of the latter:—L. i. t. 2. § 12.—L. ii. t. 1. in princip.—L. ii. t. 2. § 2.—L. ii. t. 5. § 6.—L. iii. t. 12, "De Obligationibus," in princip.—Lib. iv. t. 6, "De Actionibus," in princip.

For the scope or purpose of this Arrangement, see Table II. note 2.

[Note 4.] These various expressions for the Law of Persons may be found in the following places:—Gaius, L. i.

§ 8, 9.—Inst. L. i. t. 2. § 12 : t. 3. in pr.—Dig. L. i. t. 5. frag. 2.—Theophilus 4. 6. pr.

[Note 5.] See Gaius, L. ii. § 1.—Inst. L. ii. t. 1. in princip.

In the language of the Roman Lawyers, the term "*Res*" has various meanings; and of these, the two following demand particular notice. It means, first, Things, Persons, Acts (or Forbearances), as *subjects* or *objects* of rights and obligations:—"materia juri *subjecta*".—"in quâ jus *versatur*"—"ea quæ jure nostro *afficiuntur*"—"quæ tanquam materia ei sunt *proposita*." Or it means, secondly, Rights and Obligations themselves:—"res *incorporales*"—"ea quæ *in jure* consistunt:" velut "jus hereditatis," "jus utendi fruendi," "servitutes," "*obligationes* quoquo modo contractæ."

See Inst. L. ii. t. 2. § 2.—If this passage had been well considered, those differences about the arrangement of the Institutes, which are referred to in Note 3, would scarcely have arisen. See Table III.

For the import of the expression "Jus quod ad *Res* pertinet," see Table II. Note 2.

[Note 6.] *Dominium* (in the large signification) and *Obligatio* (in the correct signification), are synonymous with the *Jus in Rem* and *Jus in Personam* (*determinatam*) of numerous modern writers upon the Roman Law. For the import of which distinction, see Table II. note 3.

By the Classical Jurists, "Obligation" is never employed in that large generic sense which it has acquired in subsequent times. In the language of these writers, it has commonly the following meanings.

1°. It signifies the *Obligation* which answers to a Right *in personam*.

2°. Inasmuch as they had no name *specifically* belonging

to this last (rights of every class being embraced by the word *jus*), they used the *term* "Obligation" to denote that *Right* (*in personam*) with which the Obligation correlates.

3°. It signifies the *Right* (*in personam*) which resides in the party entitled, *with* the *Obligation* which is incumbent upon the opposite party: "Vinculum inter utrumque."

It is remarkable, that a similar ambiguity (with a swarm of others) sticks to the term *Jus*. Thus, "in omne *Jus* defuncti succedere," is to succeed to the *obligations* as well as to the *rights* of the deceased. So of the German word *Recht;* in the legal, as well as in the popular language of the middle ages. And so, in our own country, when a man is *obliged* to do a thing, it is not unfrequently said "that he has a *right* to do it:"—an expression at which we laugh, but which, beyond a doubt, is good Saxon English.

As the Roman Lawyers had no *specific* expression for Rights against *determinate* persons, so had they no term *appropriated* to those *general* Obligations which correspond to rights *in rem*. A Roman Lawyer, speaking of such an obligation, would have used the generic term *Necessitas;* or, less correctly, *Officium;*—the former signifying obligations which are imposed and sanctioned by *law;* the latter denoting, properly, those *religious* and *moral* obligations, which, as wanting that cogent sanction, are frequently styled "imperfect."

Consequently, the language of the Roman Lawyers stood (*nearly*) thus:

1°. For rights (universally), they had "*Jus:*" for rights *in rem* (generally), "*Dominium*" (in its loose signification): for rights *in personam*, "*Obligatio.*"

2°. For obligations or duties (universally) they had "*Officium*" and "*Necessitas:*" for the *special* obligations which answer to rights *in personam*, "*Obligatio.*"—For the *general* duties or obligations which answer to rights *in rem*, they had no *specific* expression. But since obligations of this class were *never* denoted by "*Obligatio,*" and since obliga-

tions of the other class were *always* denoted by it, "*Officium*" or "*Necessitas*," when *opposed* to "*Obligatio*," supplied the defect.—For a closer examination of the matter, see Table II. note 3.

[What follows, to the end of the Note, was found among "Loose Papers." It is marked "Note 6, to Table I.," and is the only fragment to which a place is distinctly assigned.—*S. A.*]

[The Latin *Jus* (not synonymous with Law) sometimes means Right as opposed to Obligation. Sometimes, however, it is used collectively, and denotes right *and* obligation, or obligation alone. "*Succedere in omne Jus defuncti*," is to succeed to his obligations as well as to his rights.

The word "Obligation" (*stricto sensu*) has also a double meaning. Sometimes it means the obligation which corresponds with *Jus ad Rem*; sometimes it means the right of the one party, as well as the obligation of the other. Thus the party who gains a right by a contract is said to acquire an obligation; *i. e.* a right against the party who is bound by the obligation. Thus also, the theory of the Rights and Obligations which arise out of contracts, and of the rights and obligations which resemble these, though they originate in other incidents, are treated in the Institutes, Gaius, etc. under the title of Obligations: an expression which denotes the rights of the parties entitled, as well as the obligations of the parties who are bound.

The French word "*Engagement*," which, though it properly mean, not an obligation, but an obligatory incident of a certain kind (*e.g.* a contract), also means obligation, and is used by certain French writers as a collective expression for rights and obligations.

In the German, *Rechtsverhältniss* (a relation arising out of law) is also a generic name for right *and* obligation. Sometimes it denotes right *or* obligation; but then it always denotes the right or obligation as related to the obligation or right. It denotes the one and connotes the other.

An objection to these uses of *Jus*, *Obligatio*, and *Engagement* is, that the words thus used are ambiguous, and that when we want to discriminate between right and obligation, we must constantly annex to the term a declaration of the sense in which we mean to use it.

But there is another objection of a more general nature: an objection which applies equally to *Rechtsverhältniss*: namely, that each of these terms (used collectively) supposes that every right supposes an obligation;—that every obligation as well as every right is relative; that, as the existence of a party invested with a right supposes the existence of one or more subjected to a corresponding obligation, so the existence of a party subjected to an obligation must suppose that some other party is clothed with a corresponding right. This, however, as we have already shown, is not true. There are absolute obligations, although there are no absolute rights.

The English language has this advantage, that, though its vocabulary of leading terms is scanty, they are precise and unambiguous;—Law—Right—Obligation.

"*Befugniss*" and "*Pflicht*" seem to denote right and obligation in abstract, but sometimes the same in concrete; "*Recht*" and "*Verbindlichkeit*," the converse: *i. e.* more commonly in concrete, but sometimes in abstract.

"*Forderung*," (which corresponds with the Latin *Debitum* in its largest sense) denotes that which is to be done, positively or negatively, in consequence of the obligation; which last is rather the "*vinculum*."

"*Officium*" is moral duty or obligation in the largest sense.

"*Necessitas*" (which rarely occurs) is legal duty or obligation, also in the most extensive meaning of the word obligation.

"*Obligatio*" is a species of "*Necessitas*:" *i. e.* Obligation limited to a determinate person or persons. A specific name for the "*Necessitas*" which corresponds with *Jus in rem* is not to be found.

In German there are single names for the party having a right, and for the party subjected to an obligation. In other languages, circumlocution must be resorted to. The English "*entitled*" applies only to the first, and only denotes it in an indirect manner.

Right, Obligation, Duty (*Devoir*, *Officium*),—with their corresponding expressions, "it is, or is not *right* to do such an act," "such an act ought, or ought not to be done;" "such an act is right;" "such an act is a duty," etc.—are perfectly equivalent expressions; as denoting conformity with a rule (or rather performance or observance of the obligation which the rule prescribes).

Sometimes they simply denote approbation of some rule of conduct or of some act: as, "Law as it *ought* to be."

Sometimes "ought" (and *devoir*, the verb) denote, like Law, conformity with *any* established order of incidents: as, "such an event ought to (or should, or must) have happened, on such and such suppositions."

The metaphorical sense in this case differs from that in the case of Law, only to this extent: that whereas the metaphorical "Law" denotes the customary order, "ought" denotes the metaphorical obligation which that law is feigned to have imposed. Observance of a law, or of the obligation which that law imposes, are equivalent expressions; each being causes of the uniformity which it is intended to indicate.]

[Note 7.] The distinction between Obligations *ex Delicto*, and Obligations *Quasi ex Delicto*, seems to be superfluous and illogical. Obligations *Quasi ex Delicto* arise from two causes:—

1°. Damage to the right of another by one's own *negligence* (*culpâ, imprudentiâ, imperitiâ*):

2°. Damage to the right of another by some third person for whose delicts one is liable (*e.g.* "filius in potestate," "servus," "aliquis eorum *quorum operâ* exercitor navis aut

stabuli navem aut stabulum exercet"). Cases of the former sort fall within the notion of *Delict;* and many such cases are actually ranked with Delicts in the *Lex Aquilia* (one of the principal sources of the Roman Law for that department of it). In cases of the latter sort, the class of the obligation varies with the nature of the ground upon which the liability is founded. If the mischief be caused, though remotely, by the *negligence* of the party obliged (e. g. "si *aliquatenus* culpæ reus sit, quod *operâ malorum hominum utetur*"), the case, as before, falls within the notion of *Delict.* And supposing that the party obliged is clear of intention and negligence, his obligation should be referred to that miscellaneous class, which are said, by analogy, to arise from (*quasi*) *Contracts.*

[Note 8.] The Institutes close with a short Title "De Publicis Judiciis," which only includes a *species* of Criminal Procedure, together with the Crimes and Punishments to which that species was appropriate.

See the Title in question, and also the following places in the Digests: Lib. xlvii. t. 1, "De Privatis Delictis," frag. i. 3.—t. 2. fr. 94.—t. 10. fr. 45.—t. 11, "De *Extraordinariis* Criminibus."—t. 20. fr. 1. 2.—t. 23, "De *Popularibus* Actionibus."—Lib. xlviii. t. 1, "De *Publicis* Judiciis," to t. 3, inclusive.—t. 16, to the end of the Book, and especially t. 19, "De *Pœnis,*" frag. 1. § 3.

It would seem that this Title in the Institutes is not a member or constituent part of the work, but rather a hasty and incongruous appendix added on an after thought. For, first, instead of expounding the subject in a systematic manner, it merely touches ("per indicem") a *fragment* of the subject. Secondly, It appears that Criminal Law was looked upon by the Roman Jurists as properly forming a department of *Jus Publicum:* And *this,* it is most probable, was not included in the Treatises from which Justinian's Institutes were copied or compiled.

See above, Notes 1 and 2.—Whether a similar Title was appended to the Institutes of Gaius, is uncertain; the concluding portion of the Manuscript being lost or illegible.

In order to determine the *place* which should be assigned to *Criminal Law* (or, rather, in order to determine the *arrangement* which should be given to the *whole* AGGREGATE *of Law*—"*Omne* CORPUS *Juris*"), it would be necessary to settle the import of an extremely perplexing distinction: namely, the distinction between *Public* Law and *Private* (or Civil) Law.—According to the large and vague meaning which is often attached to it, "*Public Law*" comprises, not only the whole of *Criminal Law*, but also much, if not the whole, of the Law, which, commonly, is denominated "*Private*." And if the term be taken in this its loose signification, a distinct and intelligible arrangement of the *Corpus Juris* is simply impossible. According to the strict and determinate meaning which seems to have been annexed to it by some, "*Public Law*" is *included* in the *Law of Persons*: that is to say, it is merely a subordinate member of that great Aggregate or Whole, which, under the absurd name of "*Private* Law," is frequently *opposed* to it. If "*Public* Law" be taken in this its definite import, there is only a small, though weighty, portion of *Criminal*, that can possibly be referred to it with propriety.—See Table III. *sub fine*.

Notes to Table II.

[Note 1.] This arrangement coincides exactly with that which I have given in Table I. But in lieu of the terms which occur in the Institutes of Justinian, in the Excerpts from the Classical Jurists of which his Digests are composed, in the Institutes of Gaius, etc., I have here substituted terms which originated in the Middle Ages, or in times still more recent. For the following, amongst other reasons, these terms demand attention.

1. Expositors of the Roman Law often introduce them into their writings without sufficient explanation: without *opposing* them to the corresponding expressions which were employed by the Authors of the system.

2. Writers upon Universal Jurisprudence, upon the so-called Law of Nations, and even upon Morals generally, have often drawn largely from that justly celebrated system; and, in their express or tacit references to it, have commonly adopted the terms devised by modern Civilians, or by Commentators of the Middle Ages.

3. These terms have been imported into the technical language of the systems which are mainly derived from the Roman: *e. g.* the French Law, the Prussian Law, the Common or General Law of Germany.

4. *Some* of these terms are better constructed than the corresponding expressions of the Ancients; and are, indeed, the *only* ones, authorized by general use, which denote the intended meaning without the most perplexing ambiguity.

Trace the Arrangement, which is given in the Table above, through the following places of Heineccius, the most celebrated teacher of the Roman Law in the eighteenth Century :—" Elementa Juris Civilis secundum Ordinem

Institutionum;" together with his admirable, though less known, "*Recitationes* in Elementa, etc.:"—Lib. I. tit. 1. §§ 30, 31.—tit. 2. § 74.—Lib. II. tit. 1. § 310 in princip. §§ 331 to 334. § 335 in princip.—tit. 3. § 392.—tit. 10. § 484.—Lib. III. tit. 14. §§ 767, 768, 771, 772, 774, 778.—tit. 28.—Lib. IIII. tit. 1.—tit. 5.—tit. 6.—tit. 18. And see the corresponding places of his "Antiquitates," in which the Arrangement of the Institutes is also observed.

[Note 2.] "*Jus* RERUM:" *i. e.* Law regarding Rights and Obligations *in general*, together with the *Things* which are their subjects or objects. It stands opposed, on the one side, to *Jus* ACTIONUM: *i. e.* Law not regarding *substantive* rights and obligations, but the *means* by which they are enforced when a resort to the tribunals is necessary. (See Tables V. VI.: note 2.) It stands opposed, on the other side, to *Jus* PERSONARUM: *i. e.* Law regarding the *distinctive* rights and obligations, which arise from (or, rather, compose) the various *conditions* of persons. (See below, note 3. C. b.: And see Table IV. sec. 2.)

It was probably styled *Jus* RERUM, or *Jus quod ad* RES *pertinet*, for one of the following reasons.

1. Inasmuch as the term RES included rights and obligations, the *general* law or doctrine of *rights* and *obligations*, might be styled *Jus* RERUM, without a solecism. (See Table I. note 5.)

2. The description of the RES, which are *subjects* of rights and obligations, is placed, in the Institutes, at the *beginning* of the *Jus* RERUM: and hence, a name, strictly belonging to a *section*, was naturally extended to the *whole department* of which that particular section was the prominent and most obvious feature. So the *third* department embraces the law of *Procedure;* but as *Actions* (strictly so called) occupy the foremost place, the *whole* is denoted by the partial and inadequate name of *Jus* ACTIONUM.

The arrangement of the Roman Lawyers is liable to objection in the detail, but is manifestly just in the main; though certain modern writers have involved it in thick obscurity, by grossly misconceiving the purpose, and grievously distorting the expressions.

[Note 3.] (A.) "*Jus* IN *Re*—*Jus in* REM—*Jus* REALE—DOMINIUM *sensu latiore*:"

These expressions are synonymous. Taken in the largest signification of which they are susceptible, they denote a class of rights which may be defined thus:—Rights *of* persons *against* ALL *other* persons, or, at least, against other persons *generally*:—"Facultas homini competens *sine respectu ad* CERTAM *personam*." Or these rights may be defined as follows:—Such rights *of* persons as answer to *obligations* incumbent upon ALL *other* persons, or, at least, upon other persons *generally*.

"*Jus* AD *Rem*—*Jus in* PERSONAM—*Jus* PERSONALE—OBLIGATIO:"

Taken in the largest signification of which they are susceptible, these synonymous expressions denote a class of rights to which the ensuing definitions will apply:—Rights *of* persons *against* DETERMINATE persons:—Rights answering to *obligations* incumbent upon *determinate* persons:—"Facultas homini competens *in* CERTAM *personam*."

Rights of the first class, and rights of the second class, are, therefore, distinguishable by this:—The *obligations* correlating with these, are limited to *determinate* persons: the *duties* (or obligations) correlating with those, attach *universally* or *generally*.

But though this is the essence of the distinction, they are further distinguishable thus. The duties or obligations which answer to rights of the first class, are, all of them, *negative*: that is to say, obligations to *forbear* or *abstain*.

Of those obligations which answer to rights of the second class, some are negative, but some (and most) are *positive:* that is to say, obligations to *do* or *perform*.

(B.) The full exposition of this all-pervading distinction, is necessarily reserved for the Course of Lectures to which these Tables are intended to serve as helps. But, perhaps, the following examples will give the clue to its import.

(a.) *Ownership* or *Property* (equivalent to *Dominion*, taken in its limited senses), is a term of such complex and various meaning, that it were hardly possible to force a just explanation of it into the narrow compass of a note. But in order to illustrate the distinction here in question, *Ownership* may be described, accurately enough, thus:— The Right to *use* or *deal with* some given subject, in a *manner*, or to an *extent*, which, though it is not unlimited, is *indefinite*. In which description is necessarily implied, that the Law will protect or relieve the owner against every disturbance of his right on the part of any other person. To change the expression, *all* other persons are bound to *forbear* from acts inconsistent with the scope of his right. But, here, the obligations, *which correlate with that very right*, terminate. Every *positive* obligation which may *regard* or *concern* that right, is nevertheless foreign or extraneous to it, and flows from some incident *specially* binding the party upon whom the obligation falls: for instance, from a contract into which he enters with the owner of the subject, or a delict which he commits against his right of ownership. In other words, every such *positive* obligation is confined to a *determinate* person, and is, therefore, an *obligation* (in the sense of the Roman Lawyers). And even an obligation which is *negative* and *regards* the right of ownership, will not *correspond to that very right*, in case the *vinculum* be *special:* that is to say, not attaching indefinitely upon *all* mankind, but binding some *certain* person or

some *certain* persons, and arising from some incident which particularly regards the obliged.

It follows that Ownership or Property is *Jus in Rem.* For ownership is a right *of* a person, *over* or *to* a person or thing, *against* ALL *other* persons :—a right implying and exclusively resting upon *obligations* which are at once *universal* and *negative.*

In case the *subject* of *Jus in Rem* happen to be a *person*, the position of the party entitled wears a double aspect. He has rights (*in rem*) *over* or *to* the subject, as against other persons generally. He has also rights (*in personam*) *against* the *subject*, or lies under *obligations* (in the narrower meaning of the term) *towards* the subject.

See below, in the present note, C. b.

(b.) *Servitus* (for which the English "easement" is hardly an adequate expression) is a Right to use or enjoy, in a *given* or *definite* manner, a subject *owned* by another. Take, for instance, a Right of Way over another's land.

The *term* is often extended to certain rights, which, properly, are rights of *ownership* limited in point of duration: *e. g. Ususfructus, Usus, Habitatio.* It has also been applied to a right (*Superficies*), which, justly considered, is a *species* of *Condominium: i. e.* a right of *ownership* over some given subject, but limited by a right, similar and *simultaneous*, which resides in another person. But as *servitudes* are frequently distinguished, and by the Roman lawyers themselves, from the rights which I have just mentioned, I think that authority, as well as the reason of the thing, justifies the description above.

Now, according to that description, the capital difference between Ownership and *Servitus*, lies in this: that the right of *dealing with* the subject, which resides in the owner or proprietor, is larger, and, indeed, indefinite; whilst that which resides in the party entitled to the servitude, is narrower and determinate. In respect of the

grand distinction which here is directly in question, Ownership and *Servitus* are equivalent. *Servitus*, like Ownership, is *Jus in Rem*. For it avails against *all* mankind, including the *owner* of the subject. Or (changing the expression) it supposes an *obligation* on *all* (the owner again included) to *forbear* from every act which would prevent or hinder the enjoyment. But this is the only obligation which *corresponds* to the *Jus* SERVITUTIS : every *special* obligation which happens to *regard* it, being nevertheless foreign or extraneous to it. Suppose, for example, that the servitude is *constituted* (or granted), by the owner or proprietor of the subject: and suppose that the owner or proprietor also *contracts* with the grantee, *not* to molest him in the exercise of the right. Now, here, the grantor of the servitude lies under *two* obligations: one of them arising from the grant, and answering to the right which it creates; the other derived from the contract by which he is *specially* bound, and answering to the right (*in personam*) which the contract vests in the grantee. In case he molest the grantee in the exercise of the servitude, the act is single, but the injury is double. He violates an *Officium* (or duty) which he shares with the rest of mankind, and he also breaks an *Obligation* which arises from his peculiar position.

(c.) Having given an example or two of Rights *in rem*, I will now produce examples of Rights *in personam*.

Rights begotten by *Contracts* (or, ascending to a larger expression, by *Pacts* or *Conventions*), belong, all of them, to this last-mentioned class: although there are certain cases (incapable of explanation here), in which the right of ownership, and others of the same kind, are said (by a solecism) to arise from *contracts*, or are even talked of (with conspicuous and flagrant absurdity) as if they arose from *obligations* in the sense of the Roman Lawyers.

Rights which, properly speaking, arise from *contracts*, avail against the parties who bind themselves by contract,

and also against the parties who are said to *represent* their *persons*: that is to say, who succeed, on certain events, to the *universitas* (or bulk) of their rights, and, therefore, to their *faculties* (or means) of fulfilling or liquidating their obligations. But as against persons who neither oblige themselves by contract, nor succeed *per universitatem* to the means of performing obligations, rights which, properly speaking, arise from Contracts, are nothing. Suppose, for example, that *you* contract with *me* to deliver me some moveable (a slave, a horse, a garment, or what not); but, instead of delivering it to *me*, in pursuance of the contract, that you sell and deliver it to *another*. Now, here, the rights which I acquire by virtue of the Contract or Agreement, are the following. I have a right to the moveable in question, as against you *specially*: *jus* AD *rem* (ACQUIRENDAM). So long as the ownership and the possession continue to reside in *you*, I can force you to deliver me the thing in specific performance of your agreement, or, at least, to make me satisfaction, in case you detain it. After the delivery to the *buyer*, I can compel you to make me satisfaction for your breach of the contract with *me*. But here my rights end. As against strangers to that contract, I have no right whatever to the moveable in question. And, by consequence, I can neither compel the buyer to yield it to *me*, nor force him to make me satisfaction as detaining a thing of *mine*. For "*obligationum* substantia non in eo consistit *ut aliquod nostrum faciat*, sed *ut alium nobis obstringat* ad dandum aliquid, vel faciendum, vel præstandum." (See the admirable Title in the Digests, "De Obligationibus, et Actionibus," Lib. XLIV.) But if you deliver the moveable, in pursuance of your agreement with *me*, my position *towards other persons generally* assumes a different aspect. In consequence of the Delivery by *you* and the concurring Apprehension by *me*, the thing becomes *mine*: for the Delivery and Apprehension are a *Modus* ACQUISITIONIS, and not, like the Contract of which they are a consequence,

a *Titulus* AD ACQUIRENDUM. I have now *jus in rem*:—a right to the thing delivered, as against *all* mankind:—a right answering to obligations *negative* and *universal*. And, by consequence, I can compel the restitution of the subject from *any* who may take and detain it, or can force him to make me satisfaction as for an injury to my right of ownership.—"Ubi rem *meam* invenio, ibi eam vindico; sive cum *eâ* personâ *negotium mihi fuerit*, sive non fuerit. Contra, si a bibliopolâ librum emi, isque cum *nondum mihi traditum* vendiderit iterum Sempronio, ego sane contra Sempronium agere nequeo; *quia cum* EO *nullum mihi unquam intercessit negotium*: sed agere debeo adversus bibliopolam a quo emi; *quia ago ex contractu, i. e. ex jure* AD *rem*." Heineccii *Recitationes*, Lib. II. tit. 1. § 331.

(d.) *Rights of Action*, with all other rights founded upon *injuries*, are also *jura in personam*. For they answer to obligations attaching upon the *determinate* persons, from whom the injuries have proceeded, or from whom they are apprehended.

It is true that difficulties have arisen about the nature of Actions *in rem*: *i. e.* those Actions (or, rather, those Rights of Action) of which the *ground* is an offence against a right *in rem*, and of which the *intention* (scope, or purpose) is the *restitution* of the injured party to the exercise of the violated right. But these and other difficulties besetting the Theory of Actions, appear to have sprung from this: that the nature of the right which is affected by the injury, and the nature of the remedy which is the purpose of the action, are frequently blended and confounded by expositors of the Roman Law. Which confusion of ideas absolutely disparate and distinct, seems to have arisen from the abridged shape of the expressions by which rights of action are commonly denoted. By an *ellipsis* commodious and inviting, but leading to confusion and obscurity, a name or phrase, applicable to the violated

right, is often extended improperly to the remedy. Thus, the phrase "*in rem*" is extended to certain *actions*, which, though they are necessarily directed against determinate persons, are grounded upon violations of rights availing against all mankind. And, thus, certain *actions* are styled "*ex contractu*," although they properly arise from the *non-performance* of contracts, and are only remote and incidental consequences of the contracts themselves.

To pursue this subject further, were inconsistent with my present purpose. But before I dismiss it, I will advert to an important remark made (I think) by Leibnitz—Every right to *restitution* is a right *in personam*. In case the party against whom it avails, be unconscious of the right, the right, with the corresponding obligation, is (*quasi*) *ex contractu*. For, since he is perfectly clear of intention and negligence, he is also innocent of wrong. But so soon as he is apprised of the right, either by demand or otherwise, it passes from the department (*quasi*) *ex contractu* to the class of rights and obligations which properly are founded upon *injuries*.

(C.) Hitherto, I have tried to illustrate the distinction, which is the subject of the present note, by apt *examples*. A brief examination of the *terms* by which it is usually expressed, may cast a stronger light upon the import of that distinction, and upon the importance of seizing its import in a precise and comprehensive manner.

(a.) *Jus in re*—*Jus in rem*—*Jus reale*—*Dominium* (in the large signification), will, none of them, indicate the distinction, *considered in its whole extent*, without a degree of ambiguity. For though they denote (when taken in the largest meaning of which they are susceptible) *every* right availing *universally* or *generally*, they are commonly used by the Roman Lawyers, or by succeeding Civilians, for the purpose of signifying Rights over or to *Things*: that is to say, *Things* in the narrower acceptation: *permanent*

objects which are not *persons*: *things* which, on the one hand, are opposed to *persons* themselves; and which, on the other, are distinguished from the *acts of persons*, and from the rest of the *transient* objects denominated *facts* or *events*.

But of *jura quæ valent in alios* GENERATIM—of rights which avail or obtain against other persons *generally*—of rights which answer to obligations *general* and *negative*, some are rights over or to *persons*, and some have *no* subject (person or thing).

The terms now under consideration, are, therefore, of varying extension. They are generic *and* specific. They sometimes denote universally the department of rights in question, but are commonly used in a narrower signification, and restricted to a subordinate class. Consequently, there is no concise expression, authorized by established use, which denotes the whole of these rights adequately *and* unambiguously.

(b.) Of rights existing over or to *persons*, and availing against other persons generally, take the following examples:—The right of the father to the custody and education of the child—the right of the guardian to the custody and education of the ward—the right of the master to the services of the slave or servant.

Against the child or ward, and against the slave or servant, these rights are rights *in personam*: that is to say, rights answering to *obligations* upon those *determinate* individuals. In case the child or ward desert the father or guardian, or refuse the lessons of the teachers whom the father or guardian has appointed, the father or guardian may compel him to return, and may punish him with due moderation for his laziness or perverseness. If the slave run from his work, the master may force him back, and drive him to his work by chastisement. If the servant abandon his service before its due expiration, the master may sue him for breach of the *contract of hiring*, or for

breach of an obligation (*quasi ex contractu*) implied in the *status* of servant.

Considered under another aspect, these rights are of another character, and belong to another class. Considered under that aspect, they avail or obtain against other persons generally, and the obligations (or, rather, the *officia*) to which they correspond, are invariably *negative*. As against other persons generally, they are not so much rights to the *custody and education* of the child, to the *custody and education* of the ward, and to the *services* of the slave or servant, as rights to the *exercise* of such rights *without molestation by strangers*. As against strangers, their substance consists of duties, incumbent upon strangers, to *forbear* or *abstain* from acts inconsistent with their scope or purpose. In case the child (or ward) be detained from the father (or guardian), the latter can *recover* him from the stranger by a proceeding in a Court of Justice, which, let it be named as it may, is substantially an action *in rem*: that is to say, an action grounded on an injury to a right which avails generally, and seeking the *restitution* of the injured party to the exercise of that violated right. In case the child be beaten or otherwise harmed injuriously, the father has an action against the wrongdoer for the wrong to his *interest* in the child. In case the slave be detained from his master's service, the master can recover him *in specie* (or his value in the shape of damages) from the stranger who wrongfully detains him. In case the slave be harmed and rendered unfit for his work, the master is entitled to satisfaction for the injury to his right of ownership. If the servant be seduced from his service, the master can sue the servant for breach of contract; and *also* the instigator of the desertion, for the wrong to his *interest* in the servant. In case the servant be harmed and disabled from rendering his service, the harm is an injury to the master's *interest* in the servant, as well as to the person of the latter.

The correlating conditions or *status* of husband and wife, will also illustrate that capital distinction which it is the purpose of the present note to explain or suggest.

Between themselves, they have mutual rights *in personam*, and are subject to corresponding obligations. Moreover, each has rights to the other availing against the rest of the world, and answering to duties, which, invariably, are negative. Adultery *by* the wife violates a right of the first class, and entitles the husband, against the *wife*, to a divorce *a mensâ et thoro*. Adultery *with* the wife violates a right of the second class, and gives him an action for damages, against the *adulterer*.

A right or interest *to* or *in* a person, and a right or interest *to* or *in* a thing, differ in this: that the *subject* of the former belongs to the class of *persons*, whilst that of the latter is a *thing*, in the narrower acceptation of the term. (See above, in the present note, C. a.) With reference to the capital distinction which is the matter of the present note, these rights are precisely equivalent. Each is a right availing *universally* or *generally*, and implying or *composed of* obligations, incumbent upon the world at large, to *forbear* from such *positive acts* as would defeat or thwart its purpose. The rights (*in personam determinatam*) and the obligations (*stricto sensu*), which invariably concur with the former, are nevertheless distinct from it; just as a like obligation, which may concern or regard the latter, is nevertheless extraneous to it. (See above, in the present note, B. a. b.)

But though these rights are thus equivalent or identical, certain writers have marked and distinguished the former by a peculiar name.

A right or interest to or in a *person*, has been styled, in German, "*dinglich*-persönliches Recht:" "persönliches Recht *auf dingliche Art*:" "persönliches Recht *von dinglicher Beschaffenheit*:" "Recht auf eine Person *als auf eine Sache*:"

In modern Latin, "jus *realiter* personale." Each of which expressions may be rendered into English by this: "A right or interest to or in a person *as if* that person were a *thing*."

The author of this innovation upon the established language of the science, was *Kant*. See his "Metaphysische Anfangsgründe der Rechtslehre"—"Metaphysical Principles of the Science of Law:" A treatise darkened by a philosophy, which, I own, is my aversion, but abounding, I must needs admit, with traces of rare sagacity. He has seized a number of notions, complex and difficult in the extreme, with distinctness and precision which are marvellous, considering the scantiness of his means. For, of positive systems of law he had scarcely the slightest tincture; and the knowledge of the principles of jurisprudence which he borrowed from other writers, was drawn, for the most part, from the muddiest sources: from books about the fustian which is styled the Law of Nature.

But though this novelty comes from an imposing quarter, and has even been adopted by lawyers of consummate acuteness and learning, I venture to pronounce it needless, and pregnant with perplexity and error.

"*In Rem*"* (—a phrase purely classical, barbarous and uncouth as it may look) would obviate the fancied necessity for these new fangled expressions, supposing it were used in a manner which analogy justifies or commands. The phrase is nowhere employed by the Roman Lawyers themselves, for the purpose of signifying briefly, and withal adequately and unambiguously, the entire class of rights which avail against the world at large. But if it were applied by *us* to this most important purpose, in a manner *analogous* to the modes in which it was applied by *them*, it would accomplish the purpose perfectly. Thus applied, it would denote the *compass* of a right, and not the *nature* of its *subject*: It would indicate that the right in question availed against other persons *generally*, without denoting *also* that its *subject* was a *thing*. It would apply to rights over persons, as

well as to rights over things, without the shadow of a solecism. [See below, in the present note, C. d. 8.] Consequently, the new fangled expression "jus *realiter* personale," with others of the like intention, are needless. "Jus *in rem*," taken in the large signification which analogy justifies, would point with perfect precision at the *generic* property of the right. And in case it were necessary to indicate "that its *subject* was a *person*," this, its *specific* property, might be adjected briefly and easily, by a slight qualification of the term: E. g. "jus *in rem* over (or to) a *person*."

Nor are these ungainly expressions merely needless. Those amongst them which are not some yard in length, and which are properly names rather than definitions or descriptions, are ambiguous as well as needless. According to the intention of their author, and of those who have adopted them, they *should* suggest to the hearer or reader, the *extensive compass* of the rights which they are used to denote. They *ought* to indicate, that these rights are *not* of the class which avail against *determinate* persons: that though their subjects are *persons*, they avail against the world at large *as if* they were rights over things. Now according to established usage, the term *personale* (or *persönliches*) intimates the reverse: *jus personale* commonly signifying rights which obtain against persons *certain*. Consequently, the expressions now in question defeat their own end, by suggesting the very notion which it is their purpose to exclude. Nor is this inconvenience obviated by the adverb *realiter* (or *dinglich*), which is adjected to the term *personale* for the purpose of qualifying its import. To a mind exclusively conversant with the established language, "jus *realiter* personale" (or "*dinglich*-persönliches Recht") would probably suggest a *species* of *jus personale*, though not the entire class. Instead of suggesting, as it should, *jus in rem* over a *person*, it would probably seem to indicate that *sort* of *jus in personam*, which is usually denoted by the expression *jus ad rem (acquirendam)*, and to which that significant expression

ought to be confined. In other words, it would probably seem to indicate those rights *in personam*, which imply and consist of obligations "ad *dandum* aliquid:" that is to say, obligations to deliver a *thing* (or to pass a right *in rem*) at the instance and appointment of the obligee. [See above, in the present note, B. c.; and below, note 4.]

Before I pass from the subject directly under consideration, I will offer a few remarks which it naturally suggests; and for which the present place is the least inconvenient that I can find, although they are rather digressive from the general subject of the Note.

Rights or Interests over or in PERSONS, with the general and special obligations which those rights or interests imply, fall under the department of Law denominated *Jus Personarum*. They *flow* from those *Differences of persons* (styled *Conditions* or *Status*), which are the basis of the *Division of persons*, or of the *Distribution of persons into classes*. Or (speaking more accurately) these rights and obligations are *ingredients* or *constituent parts* entering into the composition of those differences.

For the various conditions (or *status*) of various persons, are not the *sources* of differences in their rights, obligations and capacities (—"qualitates *quarum ratione* diverso jure utuntur,") but are *constituted* or *formed of* those very differences.

A given person bears a given condition (or, changing the expression, belongs to a given class), by virtue of *distinctive* rights, capacities, and duties—by a *want* of certain rights, and of capacities to take those rights—or by *exemptions* from certain obligations. In other words, these rights, capacities, and duties, or these incapacities and exemptions, are considered as forming or composing a single though complex being, and are bound into that complex One by the collective name "condition."

His condition is not the *source* of his distinctive rights

and obligations, for these *are* his condition, or, at least, constituent parts of it. Their *source* (—"id *cujus ratione* diverso jure utitur") is the fact, event, or incident, which *invests him with the condition:* that is to say, gives him the rights and capacities, and subjects him to the duties and incapacities, of which the condition is composed, or for which that word is a name. For example, the barrister or the attorney is distinguished from other men, by peculiar obligations which are imposed upon him, and by peculiar rights which he enjoys. These peculiar obligations, with these peculiar rights, *compose* or *are* the Condition of Barrister or Attorney. The *source* or *cause* of his *condition*, or of his *distinctive* obligations and rights, is his Call to the Bar, or his Admission as an Attorney.

The notion of *status* or *condition* (as understood by the Roman Lawyers), has been covered with thick darkness by the vague talk of their successors, and is not entirely free from difficulty and doubt. But I think that the plain account of it, which I have given above, will be found to tally with the truth, or to approach it pretty closely, by those who will take the trouble (trouble too seldom taken) of seeking, inspecting, and collating the original and proper authorities.

See and compare the following places:—*Gaius*, Lib. I. §§ 8, 9, 13, 67, 80, 81, 128, 159, 162.—*Inst.* Lib. I. tit. 3. § 4.—tit. 5. § 3.—tit. 16. § 4.—tit. 22. § 4. Lib. II. tit. 11. § 5.—tit. 17. §§ 1, 4, 6.—*Dig.* Lib. I. tit. 5. frag. 5, in pr., frag. 9, frag. 21, frag. 26, *sub fine.*—tit. 9. frag. 10, *sub fine.* Lib. IV. tit. 5. frag. 3, *sub fine*, frag. 11. Lib. V. tit. 13. frag. 5. §§ 1, 2, 3.

To fix the notion of STATUS with perfect exactness, seems to be impossible. For there are certain sets or series of rights and obligations, which would probably be considered by one man as forming or composing *Status*, though another would rather refer them to the *Jus Rerum: i. e.* the Law (or Doctrine) of Rights and Obligations *in general*, or of Rights and Obligations *abstracted or apart from conditions.* [See above, note 2: and also Table IV. Sec. 2.]

The matter is full of embarrassment, and I presume to touch it with no small hesitation. But still I will venture to *suggest*, that the following properties or marks are, perhaps, the *test* of a Condition: that is, may serve to distinguish Conditions properly so called, from Rights, Obligations, and Capacities to which the name is inapplicable.

1. The duties or obligations, which are constituent parts of conditions, or which correspond to rights entering into the composition of conditions, are general or indeterminate: that is to say, obligations to acts or forbearances indefinite in respect of *number*.

For example, If you hire another *as your servant*, two *conditions* (those of master and servant) are created by the contract. For each incurs obligations and each acquires rights, of which the objects are not determined *individually*, although their *kinds* may be fixed. *You* are obliged to feed him, etc., so long as the contract shall continue; and *he* is obliged to render a series of services, which are equally indefinite as to number.

But if you hire another *to do some single service* (as to go on a given errand), the *conditions* of master and servant are not created by the contract: nor, even in popular and vague language, would he be called your servant, or you his master. And a like remark will apply to every legal relation, which consists of a right, or an obligation, to a *determinate* act or forbearance. No one ascribes a *status* to Buyer or Seller, etc.

2. The duties or obligations, which are constituent parts of conditions, or which correspond to rights entering into the composition of conditions, are also indeterminate in this: that the acts or forbearances which are their objects, are indefinite with respect to *kind*.

If you hire another *as your servant*, the *kinds* of services, which he undertakes to render, are just as undetermined as the *single* or *individual* services to which the contract binds him. Consequently, you are master, and he is servant; or

you and he are severally clothed with the *conditions* which are denoted by those names.

But if you engaged another to render services *of a class* (as to supply your family with bread, to shoe your horses, or the like), you and he would hardly be clothed with *conditions* by virtue of that contract. And the same remark will apply to the relation of Landlord and Tenant, of Principal and Factor, of Grantor and Grantee of an Annuity, etc. For in all these cases, the services to be rendered by the parties, are fixed or circumscribed as to kind; although the acts or forbearances to which they are bound, are not determined as to number.

In short, Rights, Duties, Capacities, or Incapacities, can hardly be said to constitute a *Status* or Condition, unless they impart to the person a conspicuous character: unless they run through his position in a continued vein or stratum: unless they tinge the whole of his legal being with a distinctive and obvious colour.—All which talk is certainly a tissue of metaphors, and therefore little better than sheer trumpery. But such are the difficulties sticking to the matter in question, that I am tempted at every instant to flee from the toilsome analysis, and take to the ready refuge of ignorant or perplexed interpreters.

For instance: Whether the circumstance which I have mentioned as the *second* mark of a condition, be indeed such a mark, seems to admit of doubt.

There certainly are many *Status* in which it occurs, and of which it is a prominent and striking feature: *e.g.* those of Husband and Wife, Parent and Child, Guardian and Ward, Master and Slave, Alien, Insolvent, Magistrate, etc. In all which cases, the distinctive duties of the parties, or the duties which correspond to their distinctive rights, oblige to acts and forbearances indefinite in respect of kind. Instead of being confined or circumscribed by a well determined description, these acts and forbearances run indistinctly through numerous and disparate classes.

But I think I might talk, without impropriety, of the *Condition* of an *Agricultural* Servant: And yet the rights and duties of the master and servant, are, here, of a definite character.

The Right, Interest, or Estate, which a man may have in a *Dignity*, presents a similar difficulty. The scope or purpose of the right, is to bear a Title of Honour; and to get therewith the admiration or deference, which that distinctive and honorary mark may extract from the rest of the world. Consequently, the duties which correspond to the right, are simple and exactly circumscribed. They are merely obligations, incumbent upon other persons generally, to abstain from all such acts as might cast a slur upon the right: *E. g.* disputing the title of the party to wear the honorary badge; or treating the badge itself irreverently, to the possible damage of the worth which it derives from current opinion.

But yet I imagine, that a person invested with a Dignity, is also invested, by virtue of the Dignity, with a *Status* or Condition: and that in an Arrangement of Law founded upon just principles, this his distinctive right, together with the corresponding duties, would be detached from General Law (or *Jus Rerum*), and inserted in Special Law (or *Jus Personarum*). [See above, note 2, and also Table IV. Sec. 2.]

It is scarcely necessary to remark, that I have here been speaking of a Dignity considered simply or by itself. The *status* or conditions constituted by rights of the sort, are absolutely distinct from the political or public *status*, which not unfrequently concur with them in the same individuals. The political powers of an English Peer, might be precisely what they are, although he were not distinguished by a single honorary title. And a right to a Dignity (as to that of Baronet, for instance,) is frequently unconnected with a political or public character.

3. Certain Conditions are purely or mostly *onerous*.— Such is the Condition of the Slave: to whom the Law re-

fuses rights, or deals them with a niggard hand. According to the Roman Law (down to the age of the Antonines), the slave had "nullum *caput;*" was "*res:*" that is to say, he was the *subject* of rights residing in his master; lay under *obligations* towards his master and others; but enjoyed not a particle of right against a single creature. As the *subject* of another's rights, he was susceptible of *damage;* but he was not susceptible of *injury*.—According to the same system (in its earlier and ruder state), the Son *in potestate*, and the Wife *in manu*, were also "*res*," in respect of the Father and Husband; although they had "*caput*," or were invested with rights, in respect of third persons.

Now to talk of a *right* or *interest* in a purely *onerous* condition, were to talk absurdly. But so far as a condition is lucrative, or consists of rights and advantages, we may imagine an interest in the condition, *considered as a complex whole:* considered as "juris *universitas:*" considered without reference to the single and separate rights, which are component or constituent parts of it. And this, I incline to think, is a mark of every *status* not purely onerous: although there are certain aggregates, or *universities* of rights, to which the name of *status* is inapplicable. In other words, though every *juris universitas* is not a *condition*, every *condition*, so far as it consists of rights, is *juris universitas.*

Accordingly, the party has a right in his *condition*, analogous to *ownership* in a single or individual *thing: jus in rem:* a right, or interest, which avails against the world at large (although the several rights, which are ingredients in his condition, be rights *in personam* merely).

Consequently, wrongs against this right, are analogous to wrongs against ownership: And, according to the practice of the Roman Law, wrongs of both classes are redressed by analogous remedies.

Where the individual thing is unlawfully detained from the owner, he *vindicates* or recovers the thing by an action *in rem.* Where the right in the condition is wrongfully

disputed, the party asserts his right by a peculiar and appropriate action, "quæ *in rem* esse *videtur.*"

According to the practice of the English Law, controversies touching conditions, and other *juris universitates*, are commonly decided or tried in an indirect or incidental manner. Some *particular* right, parcel of the complex whole, is the immediate object of the proceeding; and the more comprehensive question is handled in the course of this proceeding, obliquely, or by way of episode. For example, The interest of the Assignees in the Estate and Effects of the Bankrupt (or, changing the expression, in the aggregate or *university* of his rights), is frequently impugned and asserted in an action of *assumpsit* or *trover*. And, thus, a question of legitimacy (precisely a question *de statu*), is not uncommonly agitated in an action of *ejectment* or *trespass*.

For these reasons, *juris universitates*, or rights in aggregates of rights, stand out sharply in the Roman Law, and are marked with comparative indistinctness in the English. But rights of the sort are not the less known to the latter. They are, in truth, essential or necessary parts in every possible system of rights and obligations. And, if I were not limited with respect to space and time, I could mention certain proceedings, before certain of the English Courts, wherein rights of the sort are brought directly to question: wherein the complex whole, abstracted from its component parts, is the immediate object of the controversy.

The wrongs, against rights in conditions, to which I have just adverted, are analogous to dispossession or detention, in the case of dominion or ownership. But a right in a condition, like ownership in an individual thing, is also obnoxious to offences which differ from dispossession: by which the enjoyment of the right is not usurped; by which the title of the party is not impugned; but by which the right is nevertheless annihilated, or its value diminished or endangered. *E.g.* To wound or beat the Child, is an offence

against the *Condition* of the Father. For the mass of the rights and advantages which accrue to the father from his fatherhood, is thereby put in jeopardy, or positively lessened in worth.—To slay the Husband and Father, is not only a crime punishable on the part of the community, but is also a civil injury to the *Conditions* of the Wife and Child. For the sum of the rights and advantages arising from their relation to the deceased, is annihilated or diminished by the act. According to the notions and the practice which have obtained in modern times, the civil injury merges in the crime. But still it is easy to imagine, that the Law might impose upon the criminal, a twofold obligation: an obligation to suffer punishment, on the part of the community at large; and a further obligation to satisfy the parties, whose *interest* in the deceased he has destroyed. Before the abolition of Appeals, this was nearly the case in the Law of England. The murderer was obnoxious to punishment, properly so called; and, in case that punishment were not inflicted, the wife and the heir of the slain were entitled to vindictive satisfaction, which they exacted or remitted at their pleasure.—If I slander your servant, and you turn him off in consequence, I wrong your servant in his *condition*. I debar him from that aggregate of contingent advantages, which his stay in your service might have given him.—To slander the skill of a surgeon, or to question without cause the solvency of a trader, are wrongs of the same sort. They are not violations of rights to individual subjects or objects, but are offences against *conditions*. They tend to abridge the sum of those future and indeterminate advantages, which the surgeon may derive from his calling, or the trader from his trade.

In short, of the several properties or marks which may be found in every *status*, the following would seem to be one.—Every *status*, so far as it consists of rights, is "juris *universitas*." Therefore, *as* an aggregate of rights, and abstracted from its component parts, it is the subject of a right

in rem which is analogous to the right of ownership. Therefore, each of these rights is obnoxious to wrongs, which are also analogous. Therefore, whatever may be the practice of this or that system, offences against ownership, and offences against rights in conditions, admit of analogous remedies.

In conditions which are purely onerous, or consist of obligations only, this mark is not to be found. But conditions of that sort commonly correlate with others in which the mark occurs. The condition of slave, for instance, is implied in the condition of master; and when I consider the latter, I necessarily consider the former. Consequently, if the mark in question belongs to lucrative conditions, it is also, indirectly, a mark of onerous conditions.

4. Single persons, or persons determined singly, may be marked or distinguished by peculiar rights and capacities, or peculiar duties and incapacities. For example, The legislature may grant to an individual, or to a corporate body, the monopoly of some commodity: laying on that individual, or on that artificial person, peculiar obligations with respect to the manufacture or import.

By the Roman Lawyers, and by modern expositors of the system, rights and obligations of the sort are often denominated *singular*: oftener, and less ambiguously, *privilegia*.

Now certain of these *privilegia* have many of the marks of conditions, but yet are distinguished from conditions. They are not styled conditions, nor are they inserted in "The Law of Persons:" the department of the *Corpus Juris* which is occupied with the description of conditions; and which would be named more appositely, if it were called "The Law of *Status*."

Nor is this exclusion capricious. All privileges are peculiar or distinctive; and some of them have other marks, which are also found in conditions. But though conditions are peculiar, still they are common or general, as contra-

distinguished from *singular:* Privileges are peculiar and *singular.* Conditions distinguish persons, considered as members of classes: Privileges distinguish persons, considered singly or individually. The distinctive rights and duties of Fathers, Wives, and Infants, constitute conditions: Distinctive rights or duties limited to Sempronius or Styles, are not a condition. At least, they are not a condition fit for the Law of Persons.

For the Law of Persons or *Status* (and the *Corpus Juris* in general), ought to be occupied with matters of wide and lasting concern. It should no more stoop to the description of these singularities or anomalies, than the Law or Doctrine of Contracts should attempt to anticipate the peculiarities which distinguish contracts individually.

Privileges are matter for a peculiar department belonging to *Jus Rerum.* For, in this peculiar department, they should not be described singly, but considered generally. It should merely determine the principles, which regulate privileges as a *class.*

In truth, the Statutes, or Customs, which create or establish privileges, can hardly be ranked with Laws. They are mere anomalies: exorbitant or irregular commands proceeding from the Legislature; or, what in effect is exactly the same thing, eccentric customs tacitly sanctioned by the Legislature. They are not so much analogous to *laws* or *rules of law,* as to *titles,* or *investitive events.* And, accordingly, most of them must be proved by the parties who are interested in sustaining them, before the Courts of Justice can know or notice their existence.

Consequently, *one* mark of Conditions is this: A Condition or *Status* is common to persons of a *class,* and is not restricted to persons *singly* or *individually* determined.

But this, like most propositions, must be qualified. There are certain powers or rights and also certain duties, which are properly ranked with conditions and inserted in the Law of Persons, although they are limited to single men or

to single bodies of men. The principle which suggests the exclusion of *singular* rights and obligations, points at the propriety of admitting them in these excepted cases. For the powers and duties in question, are of wide and lasting concern: And if they were not inserted in the *Corpus Juris*, this would be little better than a fragment and a riddle. Such are the powers of the Sovereign, where the Sovereign is One. And such are the rights and duties of certain magistrates or companies, who, though they are *single* persons, natural or artificial, are clothed with functions which deeply concern the general, and run in a continued vein through the mass or aggregate of the law.

5. It appears from the last section, that a Condition or *Status* is *common* to persons of a *class*. To which I will add (superfluous as the addition may seem), that no Condition or *Status* extends to persons indiscriminately. The rights or duties which *constitute* a Condition, reside exclusively in persons of a given description: though many of the duties or rights to which they *correspond*, may reside in persons generally, or even in all persons.

This is a truism. But, like all other truisms, it is prone to slip from the memory. If the excellent Sir Matthew Hale had looked to it steadily, and had stayed to ask the meaning of "*Jus Personarum*," it is certain that he would not have fallen into an extremely gross error which deforms his Analysis of the Law. (See, *post*, in Tables VII. and VIII., the Arrangement proposed by Hale, and adopted by Blackstone.) Under "The Rights of Persons" (meaning "The Law of Persons"), they have placed the right to liberty; the right to bodily security; the right to reputation; with the rest of certain rights which they are pleased to style *absolute*: Rights which, nevertheless, belong pre-eminently and conspicuously to "The Law of Things:" which of all imaginable rights are precisely the most general: which, in every region on earth, reside in *every* person, to whom the Sovereign or State extends a particle of protection. Such,

at least, is the case with the right to bodily security, and also with the right to liberty: *i. e.* the right of exercising, without molestation from others, that liberty of doing or forbearing which is conceded by the Law. And such is the case, nearly, with all the rest of the rights, which, under the name of *absolute*, they have foisted into the Law of Persons. All of them are rights residing in all persons, or, at least, in persons generally.

To speak plain English, they either forgot to ask, or they considered slightly and superficially, the following obvious questions:—What is a *Status* or Condition? What are the fit contents of that department of the Law, which is styled by the Roman Lawyers, or, rather, by their followers, *Jus Personarum?*

The terms which Hale employs, and which Blackstone copies, show, without more, that such was the fact. How does the title "Rights of Persons" apply to the department in question more than to another? The Rights and Obligations of Persons, are the subjects of all Law: and all the various departments into which it is divided, equally concern such rights. What would be thought of a treatise on the various races of mankind, which should *distinguish* White Men or Black Men by the simple appellative "Men"?

Nor can we impute this absurdity to the Roman Lawyers, and suppose that Hale and Blackstone were blinded by their example. For they nowhere style this department "The *Rights* of Persons." In two or three passages which lie at the threshold of their Institutes, and in which a stranger to their *system* naturally sticks and is ensnared, they do, indeed, call it "The *Law* of Persons," or "The *Law* which concerns Persons." And here, I admit, they have fallen into nonsense which is scarcely less gross than the other. But their *usual* names for the department are these: "*Divisio* Personarum"—"De *Conditione* Hominum"—"De *Statu* Hominum"—"De Personarum *Statu*:"

Names not inapposite, and intimating clearly enough the general scope of their Arrangement.

Nor is the opposite department styled by the Roman Lawyers "The *Rights* of Things:" a title, which, taken literally, ascribes rights to *rights*, and to *things*, *acts*, and *forbearances*, as subjects and objects of rights. Their name was not absurd, although it was wretchedly obscure. It was obscure in consequence of its ambiguity, and in consequence of its elliptical shape. For as "*res*," in one of its senses, signifies *things*, "Jus *Rerum*" (or "Jus quod ad *Res* pertinet") will hardly suggest to a novice, surely and readily, the meaning which was really intended: namely, The Law of *Rights* and *Obligations* (abstracted from Conditions). And though the term "*res*" signifies rights and obligations, still the elliptical expression "Jus *Rerum*" drops the *characteristic* of the department in question: namely, that it relates to Rights and Obligations *abstracted from Conditions*, and is thereby distinguished from "*Jus Personarum*," or the department which treats of Conditions.

Before I conclude this digression, which has run to unconscionable length, I will yet venture a remark.—The contents of the great departments "jus *personarum* et *rerum*," are perfectly distinct in general; but cross or blend occasionally. The line of demarcation by which the departments are severed has never been observed, nor should it be observed, with inflexible rigour. The principles or grounds of Method are subordinate to the ends of Method.

I have stated, a little above, that certain rights and obligations, which, strictly, are not conditions, should yet be ranked with conditions, and placed in the Law of Persons. I may now add, that certain rights and obligations which, properly, constitute conditions, are placed with propriety in the Law of Things.

This is remarkably the case with the rights and obliga-

tions of those who are styled the *general* representatives of testators or intestates, or are said to represent their *persons*: that is to say, who succeed *per universitatem* to their rights and duties, or, at least, to their rights or duties of a given description or class. Such is the *heir*, whether *testamentary* or *legitimate*, of the Roman Law. Such are the *executor* or *administrator*, and also the *next of kin*, in the Law of England. And such (I may add) is the English *heir*, with the general or particular *devisee*. As opposed to the executor, etc., the heir or devisee has been esteemed a *singular* successor. But it were perfectly easy to demonstrate that he is "successor *universalis*," or a *general* representative of the deceased. For he succeeds universally or generally to rights and duties of a class, or, at least, to *duties* of a class.

Now I think you would hunt in vain for a single property or mark, whereby the rights and duties of such universal successors can be distinguished from the purest of the *Conditions* which are placed in the Law of Persons. And, accordingly, Sir Matthew Hale, in his Analysis of the Law, has posted in that department the *relation* of Ancestor and Heir: *i. e.* the *status* or *condition* of the latter.

And yet these rights and duties have never been styled conditions, and are placed by general consent in the Law of Things. The reason of which seeming anomaly I take to be this.

By dividing the aggregate of the law into "jus *personarum* et *rerum*," two important ends are or may be attained: brevity and distinctness. Rights and duties *in general* (—all that can be said about them *apart from conditions*), are severed or abstracted from the *distinctive* rights and duties of which conditions are composed. Hence rights and duties *in general* are described once for all. And, hence, the march of these general descriptions is comparatively clear and easy: being freed from the numerous restrictions, extensions, and explanations with which we must take these

descriptions, when we look at the matter of conditions. (See Table IV. sec. 2.)

But in case the rights and duties of these general representatives or successors were ranked with *status* or conditions, the two important ends, which are attained by the division, would be thwarted rather than advanced. For the special matter in question is inseparably connected and interlaced with the general scheme or system of rights and obligations: In order to the explanation of the last, the former must be expounded with it. Consequently, an attempt to treat the former apart from the other, would lead to repetition and obscurity. Such is the intrinsic connexion subsisting between the two, that they *must* be considered jointly in spite of the attempt to sever them. And the title assigned to the former in the Law of Persons, were, therefore, a mere excrescence without an intelligible purpose.

The questions which I have laboured to elucidate in this long and wearisome digression, are probably the most difficult which the science of jurisprudence presents. Beyond a doubt they rank with the most important. For every attempt to digest the aggregate of the law, or to compose a treatise or commentary embracing the same subject, ought to be preceded by a perspicuous notion of the leading distinctions and divisions. On the degree of precision and justness with which these are conceived and predetermined the merit and success of the attempt will mainly depend. Errors or defects in the detail, are readily extirped or supplied. Errors in the general design infect the entire system, and are absolutely incurable.

But of all distinctions and divisions, the most comprehensive are these:—The distinction between *Conditions*, and the Rights, Obligations, and Capacities, which are *not* Conditions:—The division of Law into *general* and *special*, or Law of Things and Law of Persons.

To fix that distinction firmly, and to draw an intelligible line between those two departments, were to cleanse the science from much of the confusion and jargon by which it is obscured and disgraced. And if the few desultory remarks which I have here ventured to throw out, should turn the attention of the reflecting to these weighty and perplexing problems, I shall feel myself more than repaid for the labour which they have cost me, crude and defective as they are.

(*c.*) It is said in a preceding section (C. a.), "that of rights which avail or obtain against other persons *generally*, some are rights over or to *persons*, and some have *no* subject (person or thing)." Examples of the former have been given in the last section (C. b.). I will now produce, as briefly as I can, a few instances of the latter.

1. The right to *reputation*.—The scope or end of this right, is the esteem and goodwill of the *public*: of that indeterminate number of indeterminate persons, by whom the person in question may happen to be known. And here, it is manifest, there is not the shadow of a subject, *over* which the right can be exercised, or *in* which it can be said to inhere or exist. It is merely a right to that mass of contingent enjoyments, which the person may chance to derive from general approbation and sympathy. And yet this is a right which avails against the world at large: every false imputation, thrown upon the person in question, being a delict or injury affecting or committed against it.

2. A *monopoly*: or the right of vending exclusively commodities of a given class.—This is a right which illustrates in a striking manner the nature of *jus in rem*. Here, the generic character of the right stands alone. There is not a single circumstance to draw the attention from it. There is no determinate subject (person or thing), *over* which the right is exercised, or *in* which it can be said to exist. Nor is it a right to *sell* commodities of the class. For that is a

right which the party would enjoy without the monopoly. The right consists in the duty, which is imposed upon other persons generally, to forbear from all such acts as would defeat or thwart its purpose: namely, from selling commodities of the class.

3. Certain of those rights which are styled in the English Law *franchises:* as, for instance, a right of exercising jurisdiction in a given territory, or a right of levying a toll at a bridge or ferry.—In each of these cases, the law empowers the party to do certain acts, and lays a negative obligation upon other persons generally to forbear from disturbing the exercise. But the acts are not exercised over a determinate subject. And this peculiarity distinguishes the interest of the party from an interest in a person or thing: as, for instance, property in a slave—the interest of the father or guardian in the child or ward—ownership or *servitus* in or over a field.

It is scarcely necessary to add, that the rights *in personam*, which concur with the rights in question, are perfectly distinct from the latter. Those who reside within my territory, are bound to bring their plaints into my court. Those who traverse my bridge or ferry are bound to pay me a toll. But these are *positive* obligations, *specially* attaching upon persons who stand in peculiar positions. They are broadly distinguished from the general and negative duties, of which my right, considered as *jus in rem*, is constituted or composed: *e.g. not* to usurp jurisdiction within the limits of the territory, or *not* to molest passengers crossing the bridge or ferry.

4. Rights or interests in certain *conditions*, considered as *juris universitates*. (See above, C. b.)

In many cases, the right or interest in the *condition* concurs with a right or interest over or in a *person*. For example, the father or husband has an interest in the child or wife; the child or wife, in the father or husband; the master, in the slave or servant. But, in other cases, there

is no determinate subject (person or thing) to which the right in the condition can be said to relate. Such are rights in the conditions which are constituted by callings or professions. (See above, C. b.)

(*d.*) One of the great *desiderata* in the language of jurisprudence, is this: A pair of opposed expressions denoting briefly and unambiguously the two classes of rights which are the subject of the present note: namely, Rights availing against persons *generally* or *universally*, and Rights availing against persons *certain* or *determinate.*

The opposed or contrasted expressions commonly employed for the purpose, are the following: "jus *in* re" and "jus *ad* rem:" "jus in *rem*" and "jus in *personam:*" "jus *reale*" and "jus *personale:*" "*dominium* (sensu latiore)" and "*obligatio.*" But these are liable to the general objection which I have explained in the preceding remarks. (See C. a. b. c.) *Jus in re, jus in rem, jus reale* and *dominium*, will none of them denote, without a degree of ambiguity, the entire class of rights which avail against the world at large. Although they are often employed in that extensive signification, they commonly signify *such* of those rights as are rights to determinate *things.*

Besides this general objection, each of these pairs of terms is liable to special objections, which now I will briefly indicate. In the course of this review, certain terms, synonymous with the terms in question, will be noticed with the same brevity. At the close, I will shortly state my reasons for giving a decided preference to "*jus in rem* et *jus in personam.*"

1. "Jus *in* re" and Jus *ad* Rem."—*Jus ad rem* signifies *any* right which avails against a person *certain.* Still it is often restricted to a *species* of such rights: to those which correlate with obligations "ad *dandum* aliquid." (See above, B. c.: C. b.: And see below, note 4.) It is, therefore, ambiguous.

2. "Jus *reale*" and "Jus *personale*."—For the numerous ambiguities which stick to these expressions, see below, note 5.

3. "*Dominium* (sensu latiore)" and "*Obligatio*."—Besides the general objection which is mentioned above, *dominium* (as opposed to *obligatio*) differs from *dominium* (in the strict signification). As opposed to *obligatio*, it embraces "jura in re" (in the sense of the Classical Jurists): that is to say, "jura in re *alienâ*:" rights or interests in subjects which are *owned* by others. Taken in the strict signification, it is directly *opposed* to these rights: being synonymous with "*proprietas*," with "in re *potestas*," or with "jus in re *propria*." (See Table I.—For the numerous ambiguities which beset the term *obligatio*, see Table I. note 6.)

4. "*Potestas*" and "*Obligatio*."—It has been proposed to substitute these in the place of *dominium* and *obligatio*, *jus in rem*, and *jus in personam*, etc. But this were a change to the worse. For, first, *potestas*, as synonymous with *dominium*, is encumbered with all the ambiguities which stick to the latter. And, secondly, it is liable to an objection from which the latter is free. For it usually signifies certain *species* of the rights which avail against persons *determinate*: namely, the rights of the master against the slave (—"potestas dominorum in servos"); and the rights of the *paterfamilias* against his descendants (—"patria potestas," or "potestas parentum in liberos").

5. "*Absolute* rights" and "*Relative* rights."—Rights which avail against persons *generally* or *universally*, and rights which avail against persons *certain* or *determinate*, are not unfrequently *opposed* by the names of *absolute* and *relative*. But these expressions, as thus applied, are flatly absurd. For rights of both classes are *relative*: Or, in other words, rights of both classes *correlate with duties or*

obligations. The only difference is, that the former correlate with duties which are incumbent upon the world at large; the latter correlate with obligations which are limited to determined individuals.

6. "Jura quæ valent in personas *generatim*," and "Jura quæ valent in personas *certas* sive *determinatas*."—These expressions are sufficiently clear and precise. But they are rather definitions than names, and are much too long for ordinary use. To the purposes of discourse, brevity is just as necessary as distinctness or precision.

7. "Law of *Property*" and "Law of *Contract*."—These expressions, as thus opposed, are intended to express the distinction which is the subject of the present note. But they do the business wretchedly. Of the numerous objections which immediately present themselves, I will briefly advert to the following. 1°. We need contrasted expressions for the two classes of *rights*, and not for the *laws* or *rules* of which those rights are the creatures. 2°. *Property* is liable to the objection which applies to *dominium*. In this instance, its meaning is *generic*. It signifies rights of *every* description which avail against the world at large. But, in other instances, it *distinguishes* some *species* of those rights from some other *species* of the same rights. For example: It signifies *ownership*, as opposed to *servitude* or *easement*; or it signifies ownership indefinite in point of duration, as opposed to an interest for a definite number of years. In short, if I travelled through all its meanings and attempted to fix them with precision, this brief notice would swell to a long dissertation. 3°. *Contract* is not a name for a class of *rights*, but for a class of the *facts* or *titles* by which rights are generated. 4°. Rights arising from contracts are only a portion of the rights, which the expression "law of contract" is intended to indicate. For "law of contract," as opposed to "law of property," denotes, or should denote, rights *in personam certam*: a class which embraces rights

not arising from contracts, as well as the species of rights which emanate from those sources.

8. "Jus in *rem*" and "Jus in *personam*."—Of all customary expressions for the classes of rights in question, these are incomparably the best. "Jus in personam" (*certam* sive *determinatam*), is expressive and free from ambiguity. Cut down to *jus in personam*, it is also sufficiently concise. *Jus in rem*, standing by itself, is ambiguous and obscure. But when it is *contradistinguished* from *jus in personam*, it catches a borrowed clearness from the expression to which it is opposed.

Another decisive reason in favour of these terms will be found in the following remarks.

The phrase "*in rem*" is an expression of frequent occurrence. And in all the instances in which it occurs, the subject to which it is applied is a something which avails *generally*: "quod *generatim* in causam aliquam valet."

Take the following instance from the language of the English Law.

The *Judgments* of Courts of Justice are evidence against *parties* to the cause, and against the determinate persons (succeeding or representing them) who are styled their *privies*. As against persons who are neither parties nor privies, judgments, speaking generally, are *not* evidence. But certain judgments are excepted from the general principle, and are evidence against *all* persons, or, at least, against the world at large. Accordingly, judgments of this species are marked by a peculiar *name*: And that peculiar name is, "judgments *in rem*."

In this instance, the phrase *in rem*, and the manner of applying it, are manifestly borrowed from the Roman Lawyers. For the latter is analogous to the manner in which they employ the phrase, wherever it occurs in their writings. Whenever they use the phrase, they always intend a something which avails generally or universally: in favour of a

determined person against persons indeterminate; or in favour of indeterminate persons against a person determined. —The *cases* to which they apply it, I omit. For they could hardly be made intelligible, unless I wearied the reader with long and unseasonable explanations.

How the phrase *in rem* came to acquire this meaning, it is not very easy to perceive. It is one of the elliptical expressions with which language abounds, and which too frequently obscure the simplest and easiest notions. In this instance, it might perhaps be possible to restore the links which are dropped: to connect "*res*" (as signifying a *thing*) with "in *rem*" (as signifying *generality*). But I have neither space nor time for merely etymological researches.

To mark the important purpose to which the phrase may be turned, is matter of more moment.

Although it is applied by the Roman Lawyers to a considerable number of cases, they always apply it partially. They nowhere use it for the purpose of signifying briefly and unambiguously, "rights of *every* description which avail against persons *generally*." The large generic expression "Jus *in rem*," is not to be found in their writings.

This expression was devised by the Glossators, or by the Commentators who succeeded them. Seeing that the phrase "*in rem*" always imported *generality*, and feeling the need of a term for "*rights* which avail *generally*," they applied the former to the purpose of marking the latter, and talked of "Jura *in rem*." And, in this instance, as in many others, they evince a strength of discrimination, and a compass of thought, which are rarely displayed by the elegant and fastidious scholars who scorn them as scholastic barbarians. In spite of the *ignorance* to which their position condemned them, their *reason* was sharpened and invigorated by the prevalent study of their age: by that school logic which the shallow and the flippant despise, but which all who examine it closely, and are capable of seizing its purpose, regard with intense admiration.

Now the expression *jus in rem*, in this its analogical meaning, perfectly supplies the *desideratum* which is stated above. For as "*in rem*" denotes *generality*, "Jus *in rem*" should signify *rights* availing against persons *generally*. Therefore, it should signify *all* rights belonging to that *genus*, let their specific differences be what they may. And *that* is the thing which is wanted.

If it were possible for me to fix the meaning of words, I would distinguish the two classes of rights and obligations in the following manner.

1°. Obligations considered universally, I would style "*Offices*" or "*Duties*."

2°. Rights which avail against persons *generally* or *universally*, I would style "Rights *in rem*."

3°. Rights which avail against persons *certain* or *determinate*, I would style "Rights *in personam*."

4°. Obligations which are incumbent upon persons *generally* or *universally*, I would style "*Offices*" or "*Duties*."

5°. To those which are incumbent upon persons *certain* or *determinate*, I would appropriate the term "*Obligations*." (See Table I. note 6.)

Without introducing a single new term, and without employing an old one in a new manner, we should thus be provided with language passably expressive and distinct: which would enable the writer or speaker to move onward, without pausing at every second step to clear his path of ambiguities. All that is necessary to this desirable end, is to use established terms in established meanings, taking good care to use them *determinately*: *i. e.* to restrict each term to its appropriate object.

[Note 4.] "*Jus* IN *Re*" et "*Jus* AD *Rem*:"

(A.) By the Classical Jurists, the expression *jura in re* is opposed to, or contradistinguished from, *dominium*, *pro-*

prietas, or *in re potestas*. (See Table I. and Table II., Note 3. C. d. 3.) For example, A servitude over land of which another is the owner, is "jus in re (*alienâ*):" but the right or interest of the owner, is "*dominium*," "*proprietas*," or "in re *potestas*." The interest of the Pledgee or Mortgagee, and the interest of the Pledgor or Mortgagor, are also respectively "jus in re (*alienâ*)" and "*dominium*" (or "*proprietas*"). For, in the Roman Law, as in English Equity, the interest of the Mortgagee is considered in the rational light of a mere *lien*: a *security* for the performance of the *obligation* which is incumbent upon the Mortgagor.

Consequently, the import of *jus in re*, in the sense of the Roman Lawyers, is comparatively narrow. In *their* writings, "jura in *eâ* re," "jura in *re*," or (more concisely still) "*jura*," are the *opposite* of "dominion" or "property." They are merely abridged expressions for "jura in re *alienâ*," as contradistinguished from "jus in re *propriâ*." They are restricted to *such* of the rights, availing against the world at large, as are acquired over property or dominion residing in another person.

By the successors of the Roman Lawyers, the meaning of *jus in re* has been extended. As *they* employ it, "jus *in* re" is synonymous with "jus in *rem*:" sometimes signifying *generally*, rights which avail against the world; sometimes signifying *such* of those rights as are rights to determinate *things*. (See Note 3. C. a.: C. d.) But this extension of the term is most objectionable. For, first, it is needless and gratuitous: "jus in *rem*" answering the purpose completely. (See Note 3. C. d. 8.) And, secondly, it darkens the technical language of the original and proper authorities. We must restore the term to its narrower and genuine import, before we can follow the expositions of the Roman Lawyers themselves.

(B.) *Jus in re* (in this its extended meaning) is opposed to *jus* AD *rem*: an expression which was devised in the

Middle Ages, and of which there is not a vestige in the writings of the Classical Jurists.

(a.) As opposed to "jus *in* re" (in the modern and extended meaning), "jus *ad* rem" is synonymous with "jus in *personam*." It embraces *all* rights which avail against persons *certain*. But still it is often used in a narrower signification, and restricted to a *species* of those rights.

(b.) Taken in this its restricted meaning, it answers to the obligation "ad *dandum* aliquid." It is the right to the *acquisition* of a thing: "jus *ad* rem (*acquirendam*)." Or (speaking more generally and more adequately) it is the *right* of compelling the party, who lies under the corresponding *obligation*, to *pass* a right *in rem*. (See Note 3. B. c.: C. b.: C. d. 1.)

Take the following examples:

1. If you *contract* with me to deliver me a specific thing, I have not a right *over* or *in* the thing, but a right *to* the thing as against you *specially*. I have not *jus in rem* (or *jus in re*), but *jus* AD *rem*: a right of compelling you to *give* me *jus in rem*, or of doing some act, in the way of grant or conveyance, which shall make the thing *mine*.

2. If you owe me money determined in point of *quantity*, or if you have done me an *injury* and are bound to pay me *damages*, I have also a right to the *acquisition* of a thing, or, rather, of compelling *you* to pass me a right *in rem*. I have a right of compelling *you* to deliver or pay me moneys, which are not determined *in specie*, and as yet are not *mine*: though they *will* be determined *in specie*, and *will* become *mine*, by the act of delivery or payment.

3. Suppose that you enjoy a monopoly by virtue of a patent, and that the patent (as generally happens) empowers you to *assign* the monopoly: and suppose, moreover, that you enter into a *contract* with me to transfer your exclusive right in my favour. Now here, also, I have *jus ad rem*;

but still I have not a right to a determined *thing*. The object of the contract is neither a determined *thing*, nor a *thing* that can be determined. (See Note 3. C. c. 2.) My right is *purely* this: A right of compelling *you* to transfer a right *in rem* as *I* shall direct or appoint. If I may refine upon the expression which custom has established, I have not so properly "jus ad *rem*" as "jus ad (*jus in*) *rem*."

(c.) It is manifest that the expression "jus *ad rem*" ought not to be substituted for "jus *in personam*." It is merely an abridged expression for "jus ad rem *acquirendam*": and it properly denotes rights, which are rights to the *acquisition* of a *thing*, or (speaking more generally and adequately) to the *acquisition* of a right *in rem*. But many of the rights which avail against persons *certain*, are not of that character: They have not the acquisition of a thing (or, rather, of a right *in rem*) as their purpose or scope. For example: If you contract with me *to perform work and labour*, or if you contract with me *to forbear from some given act*, the contract gives me a right which properly is "jus *in personam*," but which it were impossible to denominate "jus *ad rem* (*acquirendam*)," without a glaring departure from the appropriate import of the expression.—"Jus *ad rem*" should clearly be restricted to a *species* of rights *in personam*.

(C.) With a view to the study of the Roman Law, or of any of the modern systems which are offsets from the former, it is highly expedient (or, rather, absolutely necessary) to distinguish "jus *ad* rem," in its broad and improper meaning, from "jus *ad* rem" (or, rather, "*ad* rem *acquirendam*"), in its restricted and correct signification. The neglect of this simple precaution, has engendered the grossest error: has darkened the fair face of the Roman Law; and covered the arrangement of the Prussian and French Codes with a mist which is scarcely penetrable.

As the matter is intimately connected with the subject of the present note, I will try to explain briefly the flagrant error which I have mentioned, and to dispel or attenuate the obscurity of which that error is the source.

(a.) The *acquisition* of a right *in rem*, is commonly or frequently *preceded* by *jus* AD *rem* (in its restricted and correct signification). This is generally the case, whenever the right *in rem* is acquired by virtue of an *alienation* : *e.g.* by virtue of *tradition* (or delivery), or by virtue of grant or conveyance *not* accompanied with tradition.

The cases which I have supposed in the last section (B. b.), are cases of the sort. In the *first* of those cases, the right *in rem* is acquired by tradition or delivery, or by conveyance without tradition : and the acquisition is preceded by *jus* AD *rem* arising from contract or agreement. In the *third* case, the nature of the acquisition is such that tradition is impossible. The mode of acquisition is conveyance without tradition ; and the preceding *jus* AD *rem*, with the correlating or corresponding *obligation*, arises, as before, from contract. In the *second* case, the mode of acquisition is simple tradition or payment; and the preceding *jus* AD *rem*, with the correlating or corresponding *obligation*, arises from an injury. In other cases, the preceding *jus* AD *rem*, with the correlating or corresponding *obligation*, arises from *quasi*-contract.

Observing that the acquisition of *jus in rem* is preceded in certain cases by *jus* AD *rem*, many of the modern Civilians generalized hastily and rashly, and fell into the following errors.

1. They inferred from those cases (which are striking by their frequency and importance), that *every* acquisition of *jus in rem* is preceded by *jus* AD *rem* and by a correlating or corresponding *obligation*. And this (as they supposed) *invariable* antecedence, they denoted in the following manner. To the fact or incident imparting *jus in rem*, they

gave the name of "modus *acquirendi*," or "modus *acquisitionis*." To the preceding incident imparting *jus* AD *rem* (which they considered as a *step* or *means* to the acquisition of *jus in rem*), they gave the name of "titulus *ad acquirendum*," or (simply and briefly) "*titulus*." For example, According to their language, a *contract* to deliver a thing is "*titulus* ad acquirendum (jus in rem)": The *delivery* or *tradition* which follows it, or by which it ought to be followed, is "*modus* (jus in rem) acquirendi" or "*modus* acquisitionis."

2. From this first error they fell into a second. Having supposed that *jus in rem* is *invariably* preceded by *jus* AD *rem*, they supposed that the latter has no independent existence, but is merely a forerunner of the former. Or (changing the expression) they supposed that the acquisition of *jus in rem* is *always* the scope or object of *jus* AD *rem* and of the *obligation* to which it answers. Or (changing the expression again) they supposed that *every* incident which imparts *jus* AD *rem* is "*titulus* ad acquirendum (jus in rem)." And if the expression *jus* AD *rem* be taken in its restricted signification, the supposition is just. But, *confounding its restricted signification with its broad and improper meaning*, they extended the supposition to *every* right *in personam* and to *every* possible *obligation*. They supposed that "jus *ad rem* (as synonymous with "jus *in personam*") has *always* the acquisition of *jus in rem* for its scope, purpose, or object: that *every* incident, which imparts "jus *in personam*," is merely "*titulus* ad (jus in rem) acquirendum," or is merely *preparatory* to a *modus acquisitionis*. The falsity of which supposition is gross and palpable. (See above, in the present note, B. c.)

Briefly stated, their errors were these:

1. They supposed that "jus *in rem*" (with the *mean* by which it is acquired) is *always* preceded by "jus *in personam*" (and by a fact or incident imparting it). 2. They supposed that "jus *in personam*," in every case whatever,

is the forerunner of "jus *in rem*:" that the fact or incident, which gives "jus *in personam*," is always a *title* to the *acquisition* of "jus *in rem*," or is always preparatory to a *modus acquisitionis*.—The *former* of these errors, combined with the varying extension of "jus *ad* rem," naturally led to the *latter*.

(b.) The influence of the *latter* upon the Prussian and French Codes, is most remarkable. I therefore reserve the further consideration of it for the notes which I purpose annexing to Tables V. and VI.*

(c.) As proofs of the extent to which the *former* obtained, I extract the following passage from *Heineccius*: the most renowned, and, perhaps, the most authoritative of the Civilians, who flourished in the eighteenth century.

The passage (which, for the sake of facilitating apprehension, I break down into short and distinct paragraphs) is taken from his excellent *Recitations*: L. II. tit. 1. § 339. (See also his '*Elements* according to the Institutes': L. II. tit. I. § 339.)

"Quod adtinet ad quæstionem *quid sit modus adquirendi?*, cavendum est, ante omnia, ne confundamus *titulum* et *modum adquirendi*: quippe qui toto cœlo differunt.

"*Omne* enim *dominium* duplicem habet caussam: *proximam*, per quam immediate dominium consequor; et *remotam*, per quam et propter quam mediate fio dominus. E. g.: Si rem a domino emi, et hic mihi rem emtam tradit, dominus fio: Et tunc traditio est caussa dominii proxima; emtio autem, caussa remota.

"Caussa dominii proxima vocatur *modus adquirendi*: caussa autem remota, *titulus*.

"Et hi etiam effectu differunt. Nam per *titulum* tantùm

* Some remarks on the Prussian and French Codes will be found in a later part of this volume.—*S. A.*

consequor jus *ad rem*: per *modum adquirendi*, jus *in re*. Ex *titulo* ago *in personam*; adversus eum quocum mihi negotium fuit: ex *modo adquirendi* ago *in rem*; adversus quemcumque possessorem. E. g.: Liber a bibliopolâ primum mihi, deinde Titio venditus est: posteriori etiam traditus. Quæritur, an ego, qui prior emi, adversus Titium agere et librum prius emtum vindicare possim? Negatur. Nam qui emit, jam tum *titulum* habet; nondum autem rem *adquisivit*: Adeoque nec in rem agit adversus quemcumque possessorem; quia *jus in re* nullum habet. Ergo agere debeo adversus bibliopolam, quocum mihi negotium fuit, ad implendum contractum; vel, si adimplere nequeat, ad id quod interest.

"Notandum itaque hic axioma: *titulus* nunquam dat *jus in re*, sed debet accedere *traditio*.

"Ergo sive emerim, sive res mihi legata, donata, permutata sit, nondum tamen sum dominus, antequam *traditio* accedat: quæ *sola* transfert *dominium* vel *jus in re*, modo præcesserit TITULUS *ad transferendum dominium habilis*.

"Ergo nec titulus sufficit sine traditione, nec traditio sine titulo:—Axioma regnans per universum jus, et probe infigendum memoriæ."

If you examine this passage closely, and take its parts in conjunction, you will find it involving the following assumptions: 1. That *every* acquisition of *dominium*, or *jus in rem*, consists of *two* degrees: One of them being the *proximate*; the other, the *remote* cause of the right: One of them, *modus acquirendi* (strictly so called); the other, *titulus*, or *titulus ad acquirendum*. 2. That the *titulus*, or *remote* cause of the right, *always* consists of an incident imparting *jus in personam*: *E. g.* a contract. 3. That the *modus acquisitionis* or *proximate* cause of the right, is *always* tradition and apprehension.

Now each of these assumptions is grossly false: and truly wonderful it is, that the learned and clear-sighted

jurist, who wrote the passage which I have copied, fell into the strange errors with which it abounds.

I will examine these assumptions in succession.

1. It is *not* true, that *every* complete acquisition of *dominium*, or *jus in rem*, is divisible into a *modus acquirendi* and a *titulus ad acquirendum*.

There are two cases, and only two, in which ACQUISITION is *opposed* to TITLE by the Roman Lawyers: namely, the case of *tradition*, and the case of *usucapion*.

According to their system, every tradition or delivery, which gives "jus *in rem*," is preceded by an *obligation* (or by "jus *ad rem*"). Considered with reference to that preceding obligation, the tradition or delivery is denominated *modus acquirendi*, or, briefly, *acquisitio*. Considered with reference to the following tradition, the contract, or other incident, which creates the obligation, is styled "justus *titulus*," "justum *initium*," "justa *caussa*": *i. e.* the legally operative *inducement* to the subsequent *modus acquirendi*.—"Nunquam enim *nuda* traditio transfert dominium: sed *ita;* si venditio, aut alia justa caussa præcesserit, propter quam traditio sequeretur."

The effect of *usucapion* (a *species* of *præscription*) is this: It cures the fault which vitiates tradition or delivery, where the party, from whom the delivery proceeds, has not the right *in rem* which he affects to transfer. Here, the tradition, by itself, is inoperative: though, coupled with subsequent possession on the part of the alienee, it may give him the right *in rem*, after a certain interval. But in order that the alienee may benefit by his subsequent possession, *bona fides* is requisite. His subsequent possession works nothing, or, in other words, there is no *usucapion*, unless he believes, at the time of the delivery, that the person affecting to alien is competent to pass the right. But this he can scarcely believe, unless the tradition or delivery be

made in the legal manner: unless the tradition or delivery *would* transfer the right, supposing that the party who makes it *had* the right to transfer. Consequently, "justus *titulus*," "justum *initium*," or "justa *caussa*," is a condition precedent to usucapion. For it necessarily precedes the tradition by which the possession is preceded, and upon which the possession operates. The contract which is the inducement to the tradition, is the *titulus ad acquirendum*: The vicious tradition, and the possession which purges it of the vice, constitute the *modus acquirendi*.

Now, in these cases, the division of the entire acquisition into a *mode of acquisition*, and *a title to acquire*, is intelligible. But, in many cases, it were utterly senseless. Take, for example, the case of *Occupation*: *i. e.* acquisition, by *apprehension* or *seisin*, of a subject which belongs to no one (—*res nullius*). Here, the entire acquisition is a simple and indivisible incident. You may call that simple incident a *mode of acquisition*, or you may call it a *title*. But to split it into a mode of acquisition *and* a foregoing title, is manifestly impossible.

The truth is, that Heineccius and other Civilians arrived at their general inference through a narrow and hasty induction. When they affirmed generally, "that a *mode of acquisition* supposes a foregoing *title*," their attention was directed exclusively to *tradition* preceded by *contract*. This is the only example adduced in the passage which I have copied, to support or illustrate the proposition. And, in cases of that class (and also of some other classes), the proposition holds universally. Or (speaking more accurately) the proposition holds universally in cases of that class, if we look exclusively at the doctrine of the *Roman* Lawyers with regard to *the essentials of the tradition*.

Their doctrine seems to be this:

The tradition is not sufficient to pass an irrevocable

right, unless the preceding contract *bind* the alienor, and therefore impart to the alienee *jus* AD *rem*. In other words, the tradition is not sufficient to pass the right irrevocably, unless the preceding contract amount to "*justus* titulus": "*titulus* ad transferendum dominium *habilis*." Accordingly, *every* acquisition by delivery, made in pursuance of a contract, is divisible into *two* degrees: a *mode of acquisition* and a *title to acquire*.

But, according to other systems (as, for instance, the English), acquisition by tradition or delivery, made in pursuance of a contract, is not *always* divisible into those distinct degrees.

Take the following example:

You sell me a house or field. The contract, however, is not reduced into writing, and therefore is void by the Statute of Frauds. But though you are not obliged to perform the contract, you convey the house or field, agreeably to the terms of the contract, by livery or feoffment.

Now, here, I acquire the subject through tradition preceded by contract. But yet it were impossible to split the entire acquisition into a *mode of acquisition* and a *title to acquire*. The acquisition in this instance, like that by occupation, is a simple and indivisible incident. In consequence of the livery and feoffment, I acquire an indefeasible right *in* or *over* the subject: *dominium*, or *jus in rem*, which is not revocable by you. But my right commences at the moment of the acquisition. Before the acquisition, *I* am not invested with *jus* AD *rem*, nor is there a corresponding *obligation* incumbent upon *you*. There is not the shadow of "*justus* titulus" from the beginning to the close of the transaction.

The exceptions which I have mentioned are amply sufficient to demonstrate, that *every* acquisition of *jus in rem* is *not* divisible into a *mode of acquisition* and a preceding *title to acquire*.

There is, however, a class of cases, which will also serve to demonstrate the same truth, and which I am desirous of noticing for another reason: namely, that they somewhat obscure that strong line of demarcation, by which "jus *in rem*" is separated from "jus *in personam*," and which should be seized distinctly by every *student of law* who aspires to master its principles.

Rights *in rem* sometimes arise from incidents which are styled *contracts*. The meaning of which seeming contradiction, is this: that the incidents in question wear a double aspect, or are followed by a twofold effect. To *one* purpose, an incident of the sort gives "jus *in personam*," and, therefore, is a *contract*: to *another* purpose, it gives "jus *in rem*," and, therefore, is a *conveyance*. In a word, the incident combines the properties of a contract *and* a conveyance; but, by one of those *ellipses* which are at once so commodious and so perplexing, it is styled, briefly, "a *contract*."

In the cases which I have now mentioned, the incident combines the properties of a contract *and* a conveyance, and is styled a contract *simply* for the sake of brevity. In other cases, the so-called contract is a pure conveyance or transfer, and is styled a *contract* by a mere abuse of language, and through a confusion of ideas which are utterly disparate and distinct.

Take the following examples of these several cases: viz. the cases wherein the incident is styled a *contract* by an ellipse; and the cases wherein the incident is styled a *contract* by a solecism.

According to English *Equity* (*i. e.* according to the *Law* which certain of our Courts administer), a sale and purchase, although it is styled a *contract*, imparts to the buyer, without more, *dominion* or "jus *in rem*." In the technical language of the system, "what is agreed to be done is considered as done." The subject of the sale is his, as against

the seller specially; and the subject is also his, as against the world at large. The only interest in the subject, which remains to the seller, is a right "in re *aliena*": a mortgage or lien expressly or tacitly created, to the end of securing the equivalent for which he has aliened.

But, according to the antagonist system which is styled preeminently *Law*, a sale and purchase, without more, merely imparts to the buyer "jus *ad* rem." The seller is *obliged* by the sale to transfer the subject to the buyer, and, in case he break his *obligation* by refusing or neglecting to transfer, the buyer may sue him on the breach, and recover compensation in damages. But that is the extent of the right which the sale imparts. The property or dominion of the subject still resides in the seller, and, in case he convey the subject to a third person, the property or dominion passes to the alienee.

Now, if the antagonist Law were fairly out of the way, the right of the buyer, according to Equity, would stand thus. Unless the seller refused to deliver the subject, and the buyer, in that event, were satisfied with his right to compensation, the sale and purchase, though styled a *contract*, would give him completely and absolutely *dominion* or "jus *in rem*." He could *vindicate* or recover the subject as against the seller himself, and as against third persons who might happen to get the possession of it. The so-styled *contract* would amount to a perfect *conveyance*.

But, by reason of the dominion or property which remains to the seller at Law, the sale and purchase, even in Equity, is still imperfect as a conveyance. In order that the dominion of the buyer may be completed in every direction, something must yet be done on the part of the seller. He must pass his *legal* interest in *legal* form. He must convey the dominion or property, which still resides in him *at Law*, according to the mode of conveyance, which Law, in its wisdom, exacts.

To this special intent or purpose, the buyer, even in

Equity, has merely "jus *in personam.*" Or (borrowing the language of the Roman Lawyers) the subject of the sale, even in Equity, "continues *in obligatione.*"

Speaking *generally*, the buyer, in contemplation of Equity, has *dominion* or "jus *in rem.*" And, speaking *generally*, the sale, in Equity, is, therefore, a *conveyance.*

But, to the *special* intent or purpose which is mentioned above, the buyer has "jus *in personam.*" Or (changing the shape of the expression) the seller remains *obliged.* This right *in personam certam*, and this corresponding *obligation*, Equity will enforce *in specie.* And, in respect of this right *in personam*, and of this corresponding *obligation*, the sale, even in Equity, is, properly, a *contract.*

According to the Roman Law, *dominium* or *jus in rem* is not transferred by tradition, unless it be preceded by contract, or by other *titulus.* "Nunquam enim nuda traditio transfert dominium: sed ita; si venditio, aut alia justa caussa præcesserit, propter quam traditio sequeretur."

And, conversely, *dominion* or *jus in rem* is not transferred by contract, unless it be followed by tradition. "Traditionibus et usucapionibus, non nudis pactis, dominia rerum transferuntur."

This rule or maxim had been imported from the Roman, into the French Law: And it formed a portion of the latter to the time of the Revolution. A contract to deliver a thing (or to pass a right *in rem*), imparted to the obligee "jus *ad rem*," or imposed upon the obligor an *obligation* to transfer or convey. But *dominion* or "jus *in rem*" was not acquired by the former, till the contract to pass the right was completed by consequent tradition.

"Dans l'ancienne jurisprudence, *pour qu'une obligation transmît la propriété*, elle devait être suivie de la tradition. Celui qui achetait une maison, par exemple, n'en devenait propriétaire que du moment où la maison lui était livrée;

si elle était livrée à une autre personne, c'était cette personne qui l'acquérait. L'obligation n'était alors qu'un *titre* pour se faire donner la propriété ; le *moyen d'acquérir* cette propriété était la tradition."—(See "Code Civil expliqué par ses motifs et par des exemples," par *J. A. Rogron*, Avocat aux Conseils du Roi et à la Cour de Cassation : Paris, 1826. Note by *M. Rogron* to Article 711.)

But, according to the Code which now obtains in France, the dominion of a subject, belonging to the class of *immoveables*, passes to the buyer by the so-called *contract*. Or (in the exquisitely absurd language of the Code and its Commentators) the right *in rem* passes to the buyer by the *obligation* which the contract creates.

"La *propriété* des biens s'acquiert et se transmet par succession, par donation entre-vifs ou testamentaire, et *par l'effet des obligations*." (Code Civil, Article 711.)—"Aujourd'hui on peut avoir la propriété, c'est-à-dire le droit de posséder, quoi qu'on ne possède pas réellement. Aussi est-elle transmise *par la seule force de l'obligation*, sans qu'il soit nécessaire qu'il y ait eu tradition." (Note to Article 711, by *M. Rogron*.)

"L'obligation de donner emporte celle de livrer la chose," etc. (Code Civil, Article 1136.)

"L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier (*i. e.* the obligee) *propriétaire*." (Code Civil, Article 1138.)—"Ainsi l'obligation donne au créancier le droit sur la chose, *jus in re ;* et, par suite, *l'action réelle*, ou *revendication :* c'est-à-dire, le droit de forcer tout détenteur de la chose qui nous appartient à nous la rendre." (Note to Article 1138, by *M. Rogron*.)

"Les effets de l'obligation de donner ou de livrer *un immeuble*, sont réglés au titre de la vente et au titre des priviléges et hypothèques." (Code Civil, Article 1140.)

"La vente est *une convention* par laquelle l'un *s'oblige* à livrer une chose, et l'autre à la payer." (Code Civil, Article 1582.)

"La vente est parfaite* entre les parties, et *la propriété est acquise* de droit à l'acheteur à l'égard du vendeur† dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé." (Code Civil, Article 1583.)—* "*Parfaite.* Cette disposition est la conséquence de l'article 711, portant que la propriété est transférée par l'effet des obligations; c'est-à-dire sans qu'il soit, comme autrefois, besoin de tradition." (Note to Article 1583, by *M. Rogron.*)—† "*A l'égard du vendeur.* Mais non à l'égard des tiers qui peuvent avoir sur la chose vendue des droits *antérieurs* à la vente. Par exemple, si le vendeur n'était pas véritable propriétaire de la chose, celui auquel elle appartient conserverait le droit de la revendiquer." (Note to Article 1583, by *M. Rogron.*)

If, then, the subject of the sale belong to the class of *immoveables*, dominion or "jus *in rem*." passes from the seller to the buyer independently of tradition. But, if the subject be *moveable*, the buyer, without tradition, has merely "jus *ad* rem." He has no right to the subject against a third person, unless the third person be *in malâ fide*, or has gotten possession of the subject with notice of the buyer's *titulus*.

"Si la chose qu'on s'est obligé de donner ou de livrer *à deux personnes successivement* est purement mobilière, celle des deux *qui en a été mise en possession réelle* est préférée, et en demeure propriétaire, encore que son *titre* soit postérieur en date; pourvu toutefois que la possession soit de bonne foi." (Code Civil, Article 1141.)—"Je vous vends ma montre: d'après le principe consacré dans les articles 711 et 1138, vous en devenez à l'instant propriétaire, bien que je ne vous l'aie pas livrée. Cependant je la vends demain à Pierre, et je la lui livre: elle doit lui rester, car il a été mis en possession réelle. Ainsi, en matière de meubles, *la tradition est encore nécessaire pour transférer la propriété.* Cette exception au principe général est basée sur la circulation des meubles, qui peuvent passer, dans le même jour,

dans vingt mains différentes; et sur la nécessité de prévenir les circuits d'actions et les nombreux procès qui en résulteraient." (Note to Article 1141, by *M. Rogron.*)

Now, according to the Articles of the Code which I have copied and collated above, the actual Law of France, with regard to the matter in consideration, would seem to stand thus.

If the subject of the sale be *moveable*, the sale, when unaccompanied by tradition, is, properly, a *contract.* The buyer has "jus *ad rem*," but not "jus *in rem.*" He has a right to the subject of the sale as against the seller specially, but he has no right to the subject as against the world at large. There is room for the distinction between *contract* and *conveyance:* between *title to acquire* and *mode of acquisition.*

But, in case the subject of the sale belong to the class of *immoveables*, the sale, though unaccompanied by tradition, is, properly, a *conveyance.* The sale imparts to the buyer *dominion* or *jus in rem;* and it, therefore, gives him a right to *vindicate* or recover the subject from *any* who may be in the possession of it. There is no room for the distinction between *contract* and *conveyance:* between *title to acquire* and *mode of acquisition.* There is no room for "justus *titulus:*" "justa *caussa:*" "justum *initium.*" For this supposes an *acquisition* to which it is the prelude: And the buyer *acquires* the subject, by the sale itself, as completely as he can acquire it. He *has* the dominion of the subject, although he has not the possession: And, by exercising a right of action annexed to his dominion, he may get the possession if he will.

In a word, the right which belongs to the buyer, according to the French Code, is the right which *would* belong to him, according to English *Equity*, if the system were not embarrassed by the conflicting provisions of *Law.*

To style the sale a *contract*, is a gross solecism. It is, however, a solecism which may be imputed to the Roman

Lawyers; and with which it were not candid to reproach the Authors of the Code.

But when they talk of *obligations* as imparting *dominion* or *property*, they talk with absurdity which has no example, and which no example could extenuate. If they had understood the system which they servilely adored and copied, they would have known that obligation excludes the idea of dominion: that it imparts to the obligee "jus *in personam*," and "jus *in personam*" merely. *This* is its essential difference: *This* is the very property which gives it its being and its name. "*Obligationum* enim substantia non in eo consistit *ut aliquod nostrum faciat*, sed *ut alium nobis obstringat* ad dandum aliquid, vel faciendum, vel præstandum."

There are, indeed, purposes, as to which the sale is a contract; and, in respect of which, it is justly styled a contract. For example: The seller is *obliged* by the sale to deliver the subject to the buyer agreeably to their common intention. And, in case it be not delivered agreeably to that common intention, the buyer may sue the seller for breach of the *obligation*, and recover compensation in damages Code Civil, Article 1146 *et seq.* But the *dominion* or *jus in rem* which the sale imparts to the buyer, is *not* a right answering to an obligation *specially* incumbent upon the seller. Considered as imparting *dominion*, the sale is a *conveyance*; and it cannot be styled a *contract*, without an impropriety in speech.

According to the Roman Law, *jus in rem* is not transferred by contract, unless the contract be followed by tradition or delivery. But to this general principle there are numerous exceptions. For example: An *hypotheca* or mortgage is sufficiently created by *pact*, although the subject be not delivered, but remain in the possession of the mortgagor. In other words, the intention to create the mortgage, expressed orally or in writing, imparts to the mort-

gagee *jus in re alienâ*. The expression of this intention on the part of the mortgagor, is styled a pact or convention. But, though it is adjected to a convention, it is not a convention of itself. Imparting to the mortgagee *jus in rem* it is, properly, a conveyance.

The confusion of *contract* and *conveyance*, by elliptical or improper expression, is one of the greatest obstacles in the way of the student. And, labouring to clear it up by apt and perspicuous examples, I have wandered at some length from the subject which I am directly considering. I now revert to that subject, and dismiss it with the following remark:—

Wherever *jus in rem* is acquired by a so-styled *contract*, the acquisition is not to be distinguished into *titulus* and *modus acquirendi*. That which might be *titulus*, supposing there were room for the distinction, transfers the *jus in rem* as completely as it can be transferred.

2. It is *not* true (as *Heineccius* and others have assumed), that every *title* to the acquisition of "jus *in rem*," consists of some incident imparting "jus *in personam*," and, therefore, imposing an *obligation* upon a person or persons *determinate*.

As I have remarked above, there are two cases, and only two, wherein *title to acquire* and *mode of acquisition* are expressly distinguished and opposed by the Roman Lawyers themselves: viz. the case of *tradition* and the case of *usucapion*. Where "jus *in rem*" is acquired by *tradition*, the acquisition is divisible into *titulus* and *modus acquirendi*: The *titulus* being always an incident imparting "jus *in personam*," and, therefore, imposing an *obligation*. Where "jus *in rem*" is acquired by *usucapion*, the acquisition is divisible in the like manner: The *titulus* being commonly an incident, or commonly supposing an incident, of the like quality or effect.

But the difference between *title to acquire* and *mode of*

acquisition is not confined to the two cases wherein the Roman Lawyers have expressly taken the distinction.

Wherever the acquisition is divisible into two *distinct* events, we may find it necessary to distinguish them, and to mark them with distinguishing names. And, in every case of the kind, we may mark them, if we will, with the names which are now in question. We may style the fact or event with which the acquisition begins, the *title to acquire*: We may style the fact or event by which the acquisition is completed, the *mode of acquisition*. We may say that the latter is the *proximate* cause of the right, or is *that* through which the right is *immediately* acquired. We may say that the former is the *remote* cause of the right, or is *that* through which the right is acquired *mediately*. We may style the former the *titulus*, *initium*, or *caussa*, to which the latter is indebted for its investitive operation or effect.

Now the cases wherein the acquisition is divisible into two events, and wherein we may find it necessary to distinguish those distinct events, are numerous. And, in many of these numerous cases, the fact or event with which the acquisition begins, is *not* a fact or event imparting *jus in personam*.

I will try to illustrate these positions by simple and plain examples.

The cases wherein *usucapion* most frequently obtains, are those which I have mentioned above: viz. cases of alienation by tradition or delivery, without right on the part of the alienor. And, in these cases, the *titulus* consists of an incident imparting *jus in personam*.

But usucapion sometimes obtains without an incident of the sort, and is nevertheless distinguished by the Roman Lawyers themselves into *title* and *mode of acquisition*. For instance, In case I *occupy* a subject which I believe to be *res nullius*, but which, in truth, belongs to another person,

I acquire the subject (after a certain interval) by continued and undisturbed possession. Now here the acquisition is divisible into *mode of acquisition* and *title*, and yet there is no incident creating an *obligation*. My continued and undisturbed possession constitutes the *mode of acquisition*. My seisin or apprehension of the subject *animo mihi habendi*, coupled with my belief at the time that the subject is *res nullius*, constitute my *title to acquire*. Without apprehension or seisin accompanied by *bona fides*, no usucapion obtains. Consequently, the apprehension *bonâ fide* is the remote cause of the right, although the subsequent possession is the proximate or direct.

Restricting the distinction in question as the Roman Lawyers have restricted it, an obligation is not created by *every* title to acquire. (Vide Dig. lib. xli. tit. 3, 4, 5, 6, 7, 8, 9, et 10.)

Succession *ab intestato*, according to the Roman Law, is governed in different cases by different principles.

In certain cases, the heir acquires the heritage *ipso jure*: that is to say, he acquires the heritage, without an act of his own, at the moment of the intestate's decease. To borrow an expressive phrase from the old French Law, "*le mort saisit le vif.*" If the heir survive the intestate a single instant, the heritage vests in the former and devolves to his own representative.

In other cases, the acquisition of the heritage commences at the death of the intestate, but is completed by the acceptance of the heir. At the moment of the intestate's decease, he has *jus hereditatem adeundi*: But he actually acquires the heritage *hereditatem adeundo*. At the moment of the intestate's decease, he has *jus delatum*: But until he signifies his acceptance expressly or tacitly, he has not *jus acquisitum*. If he die without acceptance, his right (generally speaking) is not transmitted to his representative, but the party who takes the heritage takes it as heir to the

intestate. The principle by which the transmission is here determined, is analogous to a principle ("*seisina facit stipitem*") which obtains in our Law of Descents.

Now where the acquisition of the heritage is completed by the acceptance of the heir, the facts or events which constitute the acquisition must be divided into two parcels. And these we may style, if we will, *titulus* and *modus acquirendi*. For, if we understand that distinction as the Roman Lawyers understood it, it will hold in every case wherein the acquisition is *gradual*, provided the degrees be two, and be perfectly distinct from one another. In the widely differing cases wherein they took the distinction, there must be some common circumstance to which the distinction may be referred: And the only common circumstance which I am able to discover, is the divisibility of the entire acquisition into two distinct degrees.

Supposing we take the distinction in the case immediately before us, the terms will apply thus:

The *titulus* consists of the facts whereby the right is *deferred*: namely, the intestacy, the death of the intestate, the survivorship of the heir, and his relation to the deceased. The *modus acquirendi* consists of the event whereby the acquisition is completed: namely, the acceptance of the right which is deferred.

3. It follows from what has preceded, that apprehension or seisin, consequent upon tradition or delivery, is not *invariably* an ingredient in the acquisition of *jus in rem*.

In various cases of *usucapion*, and also in the case of *occupation*, the subject is not apprehended in consequence of tradition. And where the right is acquired by a so-styled *contract*, the possession of the subject frequently continues with the party by whom the right is conveyed.

The acquisition of the heritage by the heir, is equally in point. Whether he acquire by testament or in consequence of intestacy, *ipso jure* or *hereditatem adeundo*, he acquires

without tradition and without apprehension. So completely foreign is apprehension to the acquisition of the heritage as a whole, that, though that general acquisition gives him the right of *vindication*, it gives him none of the remedies which are founded upon the *right of possession*. By the acquisition of the heritage as a whole, he acquires the dominion of the single or several things which are constituent parts of the heritage. By virtue of that general acquisition, he can *vindicate* any of those things against any who may detain it from him. But until he obtains the possession by a distinct act of apprehension, he is unable to recover it by any of those *interdicts* which are purely possessory remedies.

Acquisition by *mancipation* is commonly in the same predicament, if the subject of the conveyance be immovable (—*prædium*). There is no tradition of the subject on the part of the alienor, no apprehension of the subject on the part of the alienee. The conveyance imparts to the latter the dominion of the absent *prædium*, and gives him that right of *vindication* which dominion or property supposes. But it gives him none of the remedies which are purely possessory. Before he can exercise these in reference to the subject of the mancipation, he must acquire the actual possession, with the consequent *jus possessionis*, by a distinct act of apprehension.

Here I close my remarks upon "*titulus* et *modus acquirendi*." I have insisted upon this celebrated distinction at considerable length, for the purpose of dispelling the darkness cast upon the Roman Law by the current though false theory which I have stated and examined above. I am convinced by my own experience, that few of the difficulties, inherent in the study of the system, equal the difficulties induced upon it by that groundless and absurd conceit.

Before I proceed to the matter of the ensuing note, I will briefly interpose a remark suggested by the subject of the present.

By English Lawyers, and even by English Conveyancers, "*title*" is often used as if it were synonymous with "*right.*" But when it is used correctly, it signifies the fact, simple or complex, through which the party entitled was *invested* with a right:—the *means* by which he acquired it. In a word, "*title*" is synonymous with "*investitive* fact or event."

Tradition and usucapion are the only cases wherein the Roman Lawyers employ the term "*title*" to signify an investitive fact. And, in those two cases, it is not, properly speaking, the name of an investitive fact, but it denotes a constituent part of a *complex* investitive fact. It denotes the fact by which the acquisition begins, as contradistinguished from the fact by which the acquisition is completed. And, on the other hand, "*mode* of acquisition," as used in those cases, loses its usual import. It is not synonymous with "*investitive* fact," but it denotes a constituent part of a *complex* investitive fact. It denotes the fact by which the acquisition is completed, as contradistinguished from the fact by which the acquisition begins.

The entire fact, simple or complex, through which the party entitled was invested with a right, is styled in the language of the Roman Law, "*modus* sive *caussa* acquirendi," "*species* sive *genus* acquisitionis," or, simply and briefly, "*acquisitio.*"

Consequently, the "*title*" of the English, and the "*modus* sive *caussa* acquirendi" of the Roman Law, are synonymous names. Each of them is equivalent to "*investitive* fact or event:"—the term which has been suggested by Mr. Bentham.

"*Title*" is sometimes used by the English Lawyers in a meaning which is somewhat different. Properly speaking, the Vendor's title merely consists of the fact by which his right was acquired. But the so-called *title* which he submits to the inspection of the Purchaser, usually embraces more: viz. all such other titles as may elucidate the quality of his own, or may show the extent of the right which he

affects to transfer. (See Sugden's Law of Vendors, etc., ch. vii.)

[Note 5.]—"*Jus* REALE sive *Jura* REALIA" et "*Jus* PERSONALE sive *Jura* PERSONALIA:"

In the language of modern Civilians, and in the language of the various systems which are offsets from the Roman Law, rights availing against persons *universally* or *generally*, and rights availing against persons *certain* or *determinate*, are not unfrequently denoted by the distinctive names of "jus *reale*" and "jus *personale*:" The adjective *reale* being substituted for "*in rem*;" and the adjective *personale* for "*in personam*."

These expressions are so ambiguous, that the following cautions may be useful to the Student.

1. "Jus *reale*" and "jus *personale*," which signify rights *in rem* and rights *in personam*, must not be confounded with "jus *rerum*" and "jus *personarum*:" *i.e.* "*law* of things" and "*law* of persons." (For the import of these last-mentioned expressions, see above, Note 2: The Digression in Note 3, at C. b.: Table III. Note 3: and Table IV. Section 2.) The *law* of things and the *law* of persons, are, both of them, conversant about *rights*, real *and* personal.

2. The distinction of the Civilians between *real* and *personal* rights, must not be confounded with the distinction of the English Lawyers between *real* property or interests and *personal* property or interests. *Real* rights (in the sense of the English Lawyers) comprise rights which are *personal* as well as rights which are *real* (in the sense of the Civilians): And *personal* rights (in the sense of the former) embrace rights which are *real* as well as rights which are *personal* (in the sense of the latter). The difference between *real* and *personal* (as the terms are understood by the Civi-

lians) is essential or necessary. It runs through the English Law, just as it pervades the Roman: Although it is obscured in the English by that crowd of gratuitous distinctions which darken and disgrace the system. But the difference between *real* and *personal* (in the sense of the English Lawyers), is accidental. In the Roman Law, there is not the faintest trace of it.

In *one* instance, the term *real*, as used by the English Lawyers, bears the import which is usually annexed to it by the Civilians:

An agreement between parson and landowner discharging land from tithes, was formerly binding upon the parson and also upon his successors in the cure, if made with the consent of the patron and with the concurrence of the ordinary. And such an agreement was and is styled "a composition *real*." Why? Because it availed *generally* against incumbents of the benefice, and was not simply binding upon the parson who entered into it. Because, in short, it operated *in rem*, and not *in personam* merely.

I think that the term *real*, as used by the English Lawyers, bears the last-mentioned import in two or three instances more. But, at this moment, I am unable to recollect them. And, speaking generally, the "*real*" and "*personal*" of the Civilians, and the "*real*" and "*personal*" of the English Lawyers, denote two distinctions which are completely disparate.

3. In the sense of the Civilians, "jus *personale*" signifies *any* right which avails against a person *certain* or against persons *certain*. In the English law, "*personal*" sometimes signifies a *sort* or *species* of such rights: viz. those *rights of action*, which, in the language of the Roman Lawyers, "nec *heredibus* nec *in heredes* competunt:" which neither pass to the persons who *represent* the injured parties, nor avail against the persons who *represent* the injuring parties. Being limited to parties who are directly affected by wrong,

and only availing against parties who are authors of wrong, these rights of action are styled by English Lawyers "*personal*:" Or (more properly) they are said to *expire* (or *to be extinguished*) with the *persons* of the injured or injuring.

"Actio *personalis* moritur cum personâ," is the rule or maxim applied to the rights in question. But, like a thousand phrases dignified with the name of maxims, this wretched saw is a purely identical proposition. For a *personal* action (as the term is here understood) means a right of action which expires or is extinguished with the party.

4. The *servitudes* of the Roman Law are of two kinds: 1°. prædial or *real* servitudes (—"servitutes prædiorum sive rerum"): 2°. *personal* servitudes (—"servitutes personarum sive hominum").

Now "*real*" and "*personal*," as distinguishing the kinds of servitudes, must not be confounded with "*real*" and "*personal*," as synonymous or equivalent expressions for "*in rem*" and "*in personam*."

In a certain sense, all servitudes are *real*. For all servitudes are rights *in rem*, and belong to that *genus* of rights *in rem* which subsist *in re alienâ*. (See above, Note 3, B. b.: Note 4, A.)

And, in a certain sense, all servitudes are *personal*. For servitudes, like other rights, reside in *persons*, or are enjoyed or exercised by *persons*.

The distinction between "*real*" and "*personal*," as applied and restricted to servitudes, is this:

A *real* servitude resides in a given person, as the owner or occupier, for the time being, of a given *prædium*: *i.e.* a given field, or other parcel of land; or a given building, with the land whereon it is erected. A *personal* servitude resides in a given person, without respect to the ownership or occupation of a *prædium*: To borrow the technical language of the English Law, *real* servitudes are *appurtenant to lands or messuages*: *personal* servitudes are servitudes *in*

gross, or are annexed to the *persons* of the parties in whom they reside.

Every *real* servitude (like every imaginable right) resides in a *person* or *persons*. But since it resides in the person as occupier of the given *prædium*, and devolves upon every person who successively occupies the same, the right is ascribed (by a natural and convenient *ellipsis*) to the *prædium* itself. Vesting in every person who happens to occupy the *prædium*, and vesting in every occupier *as* the occupier thereof, the right is spoken of as if it resided in the *prædium*, and as if it existed for the advantage of that senseless or inanimate subject. The *prædium* is erected into a legal or fictitious *person*, and is styled "prædium *dominans*."

On the other hand, the *prædium*, against whose occupiers the right is enjoyed or exercised, is spoken of (by a like *ellipsis*) as if it were subject to a duty. The duty attaching upon the successive *occupiers* of the *prædium*, is ascribed to the *prædium* itself: which, like the related *prædium*, is erected into a *person*, and contradistinguished from the other by the name of "prædium *serviens*."

Hence the use of the expressions "*real*" and "*personal*" for the purpose of distinguishing servitudes.

The rights of servitude which are inseparable from the occupation of *prædia*, are said to reside in those given or determinate *things*, and not in the physical persons who successively occupy or enjoy them. And, by virtue of this *ellipsis* and of the fiction which grows out of it, servitudes of the kind are styled "servitutes *rerum*" or "servitutes *reales*:" *i.e.* rights of servitude annexed or belonging to *things*.

The rights of servitude which are not conjoined with such occupation, cannot be spoken of as if they resided in *things*. And, since it is necessary to distinguish them from real or prædial servitudes, they are styled "*servitutes personarum*" or "servitutes *personales*:" *i.e.* rights of servitude annexed or belonging to *persons*.

[Note 6.] "Or, more generally, *ex Conventione*."

(A.) *Promises* are distinguished by the Roman Lawyers into *conventions* and *pollicitations*. A convention is defined thus—*duorum vel plurium in idem placitum consensus:* Or thus—*promissio ab altero data ab altero acceptata.* A pollicitation is a promise not accepted by the promisee.

Conventions are divisible into two classes. Some might be enforced by action, *according to the more ancient law.* Others, according to that law, could not be enforced by action. Conventions of the former class are styled *contracts:* conventions of the latter class, *pacts.*

In consequence of rules introduced by the Prætors, or in consequence of laws passed by the supreme legislature, the parties interested in certain pacts were enabled to enforce them by action. In other words, pacts of certain species passed into the class of contracts, but improperly retained the name which formerly applied to them with propriety. Pacts of other species were not affected by these changes, but continued in their primitive state.

Pacts which the interested parties are enabled to enforce by action, are distinguished by the Roman Lawyers into *prætorian* and *legitimate:* that is to say, into such as the parties can enforce by virtue of the Prætorian edict, and such as the parties can enforce by virtue of acts of the legislature.

In the language of the Modern Civilians, pacts which the interested parties are unable to enforce by action, are styled *nuda:* *i.e.* not clothed with rights of action. Pacts which the interested parties are enabled to enforce by action, are styled *non nuda* or *vestita: i.e.* clothed with rights of action.

It follows from the preceding analysis, that the scheme of *obligations* which is given by the Compilers of the Institutes wants an important member: namely, obligations *ex pacto.* If they had been true to their own method, they would not have opposed *directly* to the obligations which

arise from delicts, the obligations which arise from *contracts*. According to that method, the obligations which arise from delicts should be opposed *directly* to the obligations which arise from *conventions*. And these should be divided into two classes: viz. obligations *ex contractu* and obligations *ex pacto*.

(B.) The following brief remarks upon certain terms, may save the student much perplexity.

(a.) In the language of modern jurisprudence, "*contract*" is often synonymous with the "*convention*" of the Roman Lawyers.

In the language of the Roman Law, "*contract*" denoted originally *a convention which may be enforced by action;* but, in consequence of the changes to which I have adverted above, its import was somewhat narrowed. It ceased to denote generally *a convention which may be enforced by action*, and was restricted to conventions which the parties might enforce *by virtue of the more ancient law*. For the pacts, which, in consequence of those changes, were clothed with rights of action, were not *styled* contracts, although they were contracts in effect. Consequently, the definition, which, in earlier times, applied exclusively to *contracts*, applied indifferently, at a later period, to *contracts* and *obligatory pacts*.

In the language of the English Law, "*contract*" is a term of uncertain extension. Used loosely, it is equivalent to "*convention*" or "*agreement*." Taken in the largest signification which can be given to it correctly, it denotes a convention or agreement which the Courts of Justice will enforce. That is to say, it bears the meaning which was attached to it originally by the Roman Juris-consults.

(b.) In the language of the Roman law, the term "*convention*" is synonymous with the term "*agreement*," and comprises the term "*contract*."

In the language of the English Law, "*convention*" or

"*covenant*" is restricted to *contracts*, and to contracts *of a subordinate species:* namely, to a species of that species of contracts which are evidenced by writing under seal.

In the language of the English Law, the meaning of "*bond*" is not less narrow and anomalous than that which is attached to "*covenant.*" With the Roman Jurists, and with the Modern Civilians, "*vinculum*" or "*bond*" (agreeably to its obvious meaning) is equivalent to "*obligatio.*" With the English Lawyers, it denotes a unilateral promise evidenced by writing under seal and couched in a peculiar form. Or, perhaps, it rather denotes the writing by which the promise is evidenced than the promise or contract itself.

(c.) Although "*pact*" is usually opposed to "*contract,*" it is frequently synonymous with "*convention.*" And when it is used in this, its larger or generic meaning, it is not opposed to, but comprises "*contract.*"

In the language of the Roman Jurists, or rather of the Modern Civilians, *every* pact or convention which cannot be enforced by action is styled *nude.* In the language of the English Lawyers, the import of *nudum pactum* has been strangely narrowed. Instead of denoting *generally* agreements which cannot be enforced, it is restricted to agreements which are void *for a special or particular reason:* namely, for want of sufficient consideration.

(C.) From conventions, contracts, and pacts, I pass to obligations "*quasi* ex contractu," or (speaking more generally and adequately) to obligations "*quasi* ex conventione."

(a.) Obligations *quasi ex contractu* (or, rather, *quasi ex conventione*) arise from facts which are not conventions, and which also are not violations of existing obligations or duties. In other words, they are not begotten by conventions, nor are they begotten by wrongs.

The facts which I am now considering are *not* wrongs, and are sources or causes of *obligation.* By this analogy,

and by this analogy only, these facts are allied to contracts and to pacts which are contracts in effect. And the obligations which arise from these facts are said, by reason of this analogy, to arise "*quasi* ex contractu," or "*quasi* ex conventione." For, in the language of the Roman Lawyers, *analogy* is commonly denoted by the adverb *quasi*, or by the adverb *uti* and its derivative *utilis*.

I will try to illustrate, by a plain and brief example, the propositions which I have now stated in general or abstract terms.

Solutio indebiti, or the payment and receipt of money erroneously supposed to be due, is one of the facts which I am now considering.

The erroneous payment and receipt is *a source or cause of obligation*, although the transaction is not a convention, and although there is nothing in the fact savouring of injury or wrong. There is no convention, inasmuch as the *performance* of an obligation is the only design of the payment. There is no wrong, inasmuch as the party who receives the money believes that the money is due. But inasmuch as the money is not *given*, an obligation to return it attaches upon the party who receives it from the moment at which it is paid.

He is not obliged by *convention*, but "*quasi* ex conventione." He is bound *as if* by convention, or he is bound *as it were* by convention. *As* he would have been obliged in case he had entered into a contract, *so* is he actually obliged by the fact which has actually happened.

And as the fact which begets the obligation is *as it were* a convention, so is a breach of he obligation *analogous* to a breach of contract.

(b.) The *species* of quasi-contracts have nothing in common but this: namely, that they are sources or causes of *obligation*; that they are *not* wrongs; and that they are *not* contracts or other conventions.

Accordingly, in an excerpt in the Digests from the *Res*

Quotidianæ of *Gaius*, obligations are divided in the following manner: 1st, obligations *ex contractu:* 2ndly, obligations *ex maleficio:* 3rdly, *anomalous* obligations: *i. e.* obligations which are not reducible to either of the preceding classes. "Obligationes aut ex contractu nascuntur, aut ex maleficio, aut *proprio quodam jure ex variis causarum figuris.*" Dig. lib. xliv. tit. 7, frag. 1, in princip.

It appears from other excerpts, that *anomalous* obligations were divided in the *Res Quotidianæ* into two classes: namely, obligations *quasi ex contractu* and obligations *quasi ex maleficio.* But all the obligations of this last-mentioned class which I have anywhere happened to meet with, are either obligations arising from genuine delicts, or are not distinguishable from the obligations which are styled "*quasi ex contractu.*" (See Table I. note 7.) Consequently, "*anomalous* obligations" and "obligations *quasi ex contractu*" may be considered equivalent expressions. Each of them denotes this, and this only: namely, that the sources of the obligations in question are neither delicts nor conventions, and that the various *species* into which those obligations are divisible have nothing in common excepting that negative property.

For obligations *ex delicto* or *ex maleficio*, see Table I.

(c.) The consent of the parties is of the essence of a contract. But this consent may be manifested in different ways. It may be manifested by *words*, written or spoken; or by signs which are *not* words. When it is manifested by words, the contract is styled *express.* When it is manifested by conduct, or by signs which are not words, the contract is styled *implied*, or, more properly, *tacit.* In either case, there is a genuine or proper *convention.*

But, in the language of English Jurisprudence, *quasi*-contracts (*i. e.* sources of obligation which are neither conventions nor wrongs) are styled "implied contracts," or "contracts which the law implies." That is to say, *quasi*-contracts, and genuine though implied contracts, are denoted

by one name, or by names which are nearly alike. It is scarcely necessary to add, that *quasi*-contracts, and implied or tacit contracts, are commonly or frequently confounded by English Lawyers. See, in particular, Sir William Blackstone's Commentaries, B. ii. ch. 30, and B. iii. ch. 9.

NOTES TO TABLE IX.

[Note 1.] See "*Traités de Législation Civile et Pénale, etc.*," par *M. Bentham*, publiés en François par *M. Dumont*. And see, particularly, the "*Vue générale d'un Corps complet de Droit*," which occupies the First Volume of the "*Traités, etc.*" from page 141 to the end. N.B. The edition here referred to, is the first (À Paris, An X = 1802).

[Note 2.] For the distinction between National and International Law, see Vol. I. pp. 146, 147, 168, 328 to 331. For International Law in particular, see pp. 328 to 331.

[Note 3.] For the distinction between *Droit Politique* and *Droit Civil* (as opposed to *Politique*), and for *Droit Politique* in particular, see Vol. I. pp. 147, 148, 200, 308 to 327, 333, 335 et seq., 339 et seq., 346.

[Note 4.] For the distinction between *Code Général* and *Codes Particuliers*, see Vol. I. pp. 150, 151, 299, 305, 333, 334, 364; Vol. III. p. 278. It may be inferred from those places, as well as from Vol. I. pp. 294 to 297 (*Des États Domestiques et Civils*), and from Vol. II. pp. 175 to 236 (*Des États Privés*), that the distinction, intended by Mr. Bentham, tallies *nearly* with the long-established distinction between *Jus Rerum* and *Jus Personarum*. See Tables I., II., IV. Section 1, VII., VIII., X.

[Note 5.] For the distinction between *Substantive* and *Adjective* Law (or Law *simpliciter*, and Procedure), see Vol. I. pp. 149, 150, 166. For Procedure in particular, see pp. 349 to 351.

[Note 6.] For the distinction between *Civil* Law and

Penal Law, see Vol. I. pp. 155 et seq., 159 et seq., 170; and compare with those places the second paragraph of p. 298. For the Civil Code in particular, see pp. 225 to 307, and Vol. II. pp. 110 to 174. For the Penal Code in particular, see Vol. I. pp. 170 to 224; Vol. II. p. 237 to the end; Vol. III. p. 1 to 191.

[Note 7.] The important division of Rights into *Jura in Rem* and *Jura in Personam* (*determinatam*), is neither formally stated, nor consistently pursued, in the "*Vue Générale.*" It may, however, be traced from p. 247 to p. 293; and see particularly pp. 271, 272, 290, 291, 292, 293. In the Second Volume it appears with more distinctness. See (pp. 110 to 155) "Modes of Acquiring *Property*": i. e. *Servitudes*, with other Rights *in re alienâ*, as well as Dominion or Property strictly so called: And see also (pp. 156 to 168) "Modes of acquiring Rights to *Services*": *i. e.* Acts to be done or forborne by *assignable* or *determinate* persons, in consequence of *obligations* (as understood by the Roman Lawyers). At p. 167, the term "Obligation" is employed in this its original meaning.

[Note 8.] For Obligations *ex contractu* and *quasi ex contractu*, see Vol. I. pp. 271, 272, 286 et seq.; Vol. II. pp. 156 to 168, 362 et seq.

[Note 9.] The Law of Civil Injuries (with the corresponding Remedies) and the Law of Crimes (with the corresponding Punishments and Remedies), are not divided into two independent parcels, but are classed or blended together under the name of "*Droit Pénal.*" See Vol. I. pp. 155 et seq., 159 et seq., 170 to 224; Vol. II. p. 237 to the end of the Volume; Vol. III. p. 1 to 191. Compulsory Restitution and Satisfaction relate, for the most part, to Civil Injuries; Penal Remedies, to Crimes. See Vol. II. pp. 308 to 379; and p. 380 to the end of the Volume.

ESSAYS ON INTERPRETATION AND ANALOGY.

NOTE ON INTERPRETATION.

The following Essays or Notes are referred to in the thirty-third Lecture (Vol. II., p. 274) in which the same subjects are more succinctly handled. They were not found with the Lectures, but were doubtless intended by the Author to be incorporated in the great work which he meditated.

In a note in the page above-mentioned, I spoke of the "Essay on Interpretation" as complete. This, unfortunately, is a mistake; nor have I been able to find any trace of the conclusion.

The original of the "Excursus on Analogy" consists, in great part, of unarranged and almost illegible fragments, amongst which it was extremely difficult to establish anything like order and coherence. I hesitated for some time whether to submit what the Author left in so imperfect a state, to the public eye. Nor should I have ventured to do so, had I not been encouraged by the opinion of several persons of high authority in such a matter, to whom it has been submitted. They have exhorted me by no means to suppress this essay; "Since," to use the words of one of those most qualified to decide, "though, from the fragmentary form in which it must necessarily appear, its excellencies will probably be hidden from most readers, its great philosophical value will be apparent to those who study it with attention."

S. A.

NOTE ON INTERPRETATION

(PROPER AND IMPROPER).

IN the text* I have tried to contrast Interpretation (in the proper acceptation of the term) and the induction of a rule of law from a judicial decision or decisions. In (the earlier portion of) the present note, I shall try to distinguish Interpretation (in the proper acceptation of the term) from the various modes of judicial legislation to which the name of interpretation is not unfrequently misapplied.

The discovery of the law which the lawgiver intended to establish, is the object of genuine interpretation : or, (changing the phrase,) its object is the discovery of the intention with which he constructed the statute, or of the sense which he attached to the words wherein the statute is expressed. For the reasons which I have given in the text, the literal meaning of the words wherein the statute is expressed, is the primary index or clue to the intention or sense of its author.

Now the literal meaning of words (or the grammatical meaning of words) is the meaning which custom has annexed to them. It is the meaning attached to them commonly by all or most of the persons who use habitually the given language: Or, if the words be technical, it is the meaning attached to them commonly by all or most of the persons who are specially conversant or occupied with the given art (or science). Generally, the customary meaning of the words wherein the statute is expressed, is obvious or easily assignable; and generally, therefore, the interpreter assumes it tacitly, and without

* See Lecture XXXIII., Vol. II. p. 274.

hesitation and inquiry. But, occasionally, the customary meaning of the words is indeterminate and dubious. What is the meaning which custom has annexed to the words, is, therefore, an inquiry which the interpreter may be called upon to institute. Consequently, the interpretation of a statute by the literal meaning of the words may possibly consist of a twofold process: namely, an inquiry after the meaning which custom has annexed to the words, and a use of that literal meaning as a clue to the sense of the legislature. The interpreter seeking the meaning annexed to the words by custom, may not be able to determine it; or he may not be able to find in it, when he has determined or assumed it, any determinate sense that the legislature may have attached to them: And, on either of these suppositions, he may seek in other *indicia*, the intention which the legislature held. Or, when he has determined or assumed the customary meaning of the words, the interpreter may be able to discover in their customary or literal meaning, a determinate or definite intention that the legislature may have entertained: And, on this supposition, he ought to presume strongly that the possible intention which he finds is the very intention or purpose with which the statute was made.

The intention, however, of the legislature, as shown by that literal meaning, may differ from the intention of the legislature, as shown by other *indicia*; and the presumption in favour of the intention which that literal meaning suggests, may be fainter than the evidence for the intention which other *indicia* point at. On which supposition, the last of these possible intentions ought to be taken by the interpreter, as and for the intention which the legislature actually held. For the literal meaning of the words, though it offers a strong presumption, is not conclusive of the purpose with which the statute was made.

It appears, then, from what has foregone, that the subjects of the science of interpretation are principally the

following: namely, the natures of the various indices to the customary meaning of the words in which the statute is expressed: the natures of the various indices, other than that literal meaning, to the intention or sense of the lawgiver: the cases wherein the intention which that literal meaning may suggest, should bend and yield to the intention which other *indicia* may point at.

Having stated the object or purpose of genuine interpretation, and pointed at the subjects of the science which is conversant about it, we will touch upon the interpretation, *ex ratione legis*, through which an unequivocal statute is extended or restricted. It may happen that the author of a statute, when he is making the statute, conceives and expresses exactly the intention with which he is making it, but conceives imperfectly and confusedly the end which determines him to make it. Now, since he conceives its scope inadequately and indistinctly, he scarcely pursues its scope with logical completeness, or he scarcely adheres to its scope with logical consistency. Consequently, though he conceives and expresses exactly the intention with which he is making it, the statute, in respect of its reason, is defective or excessive. Some class of cases which the reason of the statute embraces is not embraced by the statute itself; or the statute itself embraces some class of cases which a logical adherence to its reason would determine its author to exclude from it.

But, in pursuance of a power which often is exercised by judges, (and, where they are subordinate to the State, with its express or tacit authority,) the judge who finds that a statute is thus defective or excessive, usually fills the chasm, or cuts away the excrescence. In order to the accomplishment of the end for which the statute was established, the judge completes or corrects the faulty or exorbitant intention with which it actually was made. He enlarges the defective, or reduces the excessive statute, and adjusts it to the reach of its ground. For he applies it to a case of a class which it surely does not embrace, but to which its

reason or scope should have made the lawgiver extend it; or he withholds it from a case of a class which it embraces indisputably, but which its reason or scope should have made the lawgiver exclude from it.

Now, according to a notion or phrase which is current with writers on law, the judge who thus enlarges, or thus reduces the statute, "interprets the statute by its reason:" or his extension or restriction of the defective or excessive statute is "extensive or restrictive interpretation *ex ratione legis.*" His adjustment, however, of the statute to the reach or extent of its ground, is a palpable act of judicial legislation, and is not interpretation or construction (in the proper acceptation of the term). The discovery of the intention with which the statute was made, is the object of genuine interpretation; and, of the various clues to the actual intention of the lawgiver, the reason of the statute is one.

But where a statute is extended or restricted in the manner which we now are considering, the actual intention of the lawgiver is not doubted by the judge. Instead of unaffectedly seeking the actual intention of the lawgiver, and using the reason of the statute as one of the various clues to it, the judge rejects an actual (though faulty or exorbitant) intention which the lawgiver palpably held. Instead of interpreting a statute obscurely and dubiously worded, the judge modifies a statute clearly and precisely expressed: putting in the place of the law which the lawgiver indisputably made, the law which the reason of the statute should have determined the lawgiver to make. Consequently, where the judge in show interprets the statute restrictively, he abrogates or annuls it partially. And where the judge in show interprets the statute extensively, he makes of its reason a judiciary rule by which its defect is supplied. He makes of the reason of the statute a general ground of decision which provides for the class of cases overlooked and omitted by the lawgiver: For, as a *ratio decidendi,* though not as a *ratio legis,* the reason of a statute may perform the functions of a law.

In the following passages from the Pandects (Lib. I. tit. 3, frag. 10, 11, 12, 13), the rationale of the process of extension, which the judge performs upon the statute, is stated unaffectedly and frankly. "Neque leges, neque senatusconsulta ita scribi possunt, ut omnes casus, qui quandoque inciderint, comprehendantur; et ideo de his, quæ primo constituuntur, interpretatione (aut constitutione principis) certius statuendum est." "Non possunt omnes articuli singillatim aut legibus aut senatusconsultis comprehendi; sed cum in aliquâ causâ sententia (sive ratio) eorum manifesta est, is, qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet." "Quotiens lege aliquid unum vel alterum introductum est, bona occasio est, cetera, quæ tendunt ad eandem utilitatem, interpretatione, vel certe jurisdictione suppleri."

There is, it is true, an extensive, or restrictive interpretation which is properly interpretation or construction. For the literal meaning of the words wherein the statute is expressed, may not correspond to the purpose wherewith it was actually made; and the interpreter of the statute, guided by another index to the actual purpose of the statute, may abandon the meaning which custom has annexed to the words, for the meaning which the lawgiver attached to them.

Now, if the meaning annexed to the words by custom be narrower than the meaning attached to the words by the lawgiver, the interpreter (it is commonly said) interprets the statute extensively: If the former of the meanings be broader than the latter, the interpreter (it is commonly said) interprets the statute restrictively. But, manifestly, the statute itself is not extended or restricted by the process which we now are considering. The very law which actually was made by the lawgiver, is also the very law which is sought and stuck to by the interpreter; who merely proportions the grammatical meaning of the words to the broader or narrower meaning with which the lawgiver used them. The interpreter ex-

tends or restricts, not the statute itself, but the literal meaning of the words wherein the statute is expressed.

Having tried to distinguish genuine interpretation from the modes of judicial legislation which often are styled interpretation, we proffer a few remarks on some of the leading terms which are connected with the distinction in question.

Although the intention with which a statute is made often differs from the end which moves the lawgiver to make it, the reason of a statute and the actual intention of the lawgiver oftener coincide or tally. Accordingly, they often are opposed together, or contradistinguished jointly, to the literal meaning of the words in which the statute is expressed. Now, as contradistinguished jointly to the literal meaning of the words, the reason of a statute with the actual intention of the lawgiver are commonly styled by the moderns "the spirit of the law:" by the Roman jurists, and the moderns who adopt their language, "the *sentence* of the law."

According to most of the writers who have treated of interpretation, it is either *grammatical* or *logical*. The interpretation of a statute bears the name of *grammatical* in so far as it seeks the meaning which custom has annexed to the words, or seeks in that meaning exclusively the actual intention of the lawgiver. As looking for other indices to the actual intention of the lawgiver, or as seeking his actual intention through such other *indicia*, the interpretation of a statute assumes the name of *logical*. But as every process of interpretation involves a logical process, the contradistinguished epithets scarcely suggest the distinction which they are employed to express. The extension or restriction, *ex ratione legis*, of a statute unequivocally worded, is not interpretation or construction (in the proper acceptation of the term). According, however, to most of the writers who have treated of interpretation, this process of extension or

restriction belongs to the kind of interpretation which they mark with the name of logical.

Of the numerous equivocal terms which the language of jurisprudence comprises, *equity* perhaps is the most equivocal and perplexing.* Now, of the many and disparate meanings given to this slippery expression, some are connected inseparably with a kind of spurious interpretation: namely, with the so-called extensive interpretation, *ex ratione legis*, of a statute unequivocally worded. Where a defective statute is thus adjusted to its reason, there lies an *equality* or *æquity* (or a parity, analogy, or likeness) between the cases which the statute includes and the cases to which it is extended. A case to which it is extended, as well as a case which it includes, is embraced by its reason; and the two cases, therefore, in their common relation to its reason, are *equal*, analogous, or like.

Accordingly, *equity* or *æquity* signifies the objects following (besides a multitude of others):—1. The parity between a case to which the statute is extended and a case which the statute includes.—2. The spurious extensive interpretation *ex ratione legis*: that is to say, the extension of the statute agreeably to the parity of the cases, or the process of extending the statute agreeably to the parity of the cases.—3. A personified abstract name which is moved by the parity of the cases to call for the extension of the statute. ("Quod in re pari valet, (says Cicero,) valeat in hac quæ par est: valeat *æquitas*, quæ paribus in causis paria jura desiderat.")—4. The reason of the statute to which the extension is given, or the reason of any statute which needs a similar extension. (It often is said, for example, of such or such a case, that the case is within the *equity* of such or such a statute, though the case is not included by the statute itself.)

* See Vol. II. pp. 275 and 312.

The spurious extensive interpretation *ex ratione legis*, is styled *analogy* as well as *equity*. And it is said of *analogy*, as it is said of *equity*, that she is moved by the parity of the cases to call for the extension of the statute. It is said moreover of the pretended interpreter, that he interprets the statute *analogically*. But it would seem that the term *analogy*, like the expression *equity*, signifies most properly the parity between the cases.*

["Equity" is not applicable to restrictive interpretation *ex ratione legis*.]

The extensive or restrictive interpretation, *ex ratione legis*, of a statute unequivocally worded, are not the only modes of judicial or oblique legislation to which the name of interpretation is often misapplied. *E.g.*: Entire or partial abrogation of a statute (with or without substitution of a new rule), without regard even to the reason of the statute. The grounds for which are, the judge's own views of utility, or of that consequence and analogy (in legislation) to which we shall advert hereafter.

(He is to be blamed commonly, not for innovation, but for working it under false pretences, and without system.)

So, also, the creation of judiciary law (independently of the application of any statute) has been styled interpretation. *E.g.*: The law devised by *prudentes*, and adopted by tribunals, was said to be devised by *interpreting* the old law: such interpretation consisting, partly, in forming new rules, by consequence and analogy, on anterior law (statute or judiciary) (and hence, probably, the name of interpretation); and, partly, in forming new rules, without regard to consequence or analogy, according to general utility, or any other standard of ethics (or legislation).†

* See Note on Analogy, *post*.

† "Interpretis officium, quod proprie in legis *sententia explicanda* versatur, per se quidem facile discernitur ab eorum munere, quorum est, ad causas applicare leges: unde etiam recte de utroque genere seorsim multa

As I shall show hereafter, authentic interpretation is also genuine or spurious. A declaratory law being truly such, or introducing the new law under the guise of interpreting the purpose with which the old was made.*

From the two processes† which I have endeavoured to contrast, I pass to the celebrated phrase which is closely connected with them; though it regards the application of law, (and also the creation of law,) rather than the discovery of law by interpretation or induction. "After all the certainty (says Paley) that can be given to points of law, either by the interposition of the legislature, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater part of legal controversies may be resolved, will remain still: namely, "*the competition of opposite analogies.*" The nature of the difficulties denoted by this celebrated phrase, he attempts to state in the following passage. "When a point of law has once been adjudged, neither that question, nor any which completely, and in all its circumstances, corresponds with *that*, can be brought a second time into dispute. But questions arise which resemble *that* only indirectly, and in part, and in certain views and circumstances, and which seem to bear an equal or a greater affinity to other adjudged cases: questions which can be brought within any fixed rule only by analogy, and which hold an analogy by relation to different rules. It is by the urging of the different analogies

præcipiuntur. Est tamen genus quoddam præceptorum velut promiscuum atque in medio positum, eorum scilicet, quæ ad leges ex earum *ratione*, aut ad *similia producendas* aut *restringendas* spectant."—Mühlenbruch, Doc. Pan. Vol. I. Lib. I. cap. 3.

* Interpretation by *règlement*. See French Code and Bentham's Judicial Establishments.

† See Vol. II. p. 336.

that the contention of the Bar is carried on: And it is in the comparison, adjustment, and reconciliation of them with one another; and in the discerning of such distinctions, and the framing of such a determination, as may save the various rules alleged in the cause, or, if that be impossible, as may give up the weaker analogy to the stronger, that the sagacity and wisdom of the Court are seen and exercised." Now, like all or most of the phrases into which "analogy" enters, the celebrated phrase "the competition of opposite analogies" is often used indeterminately. Accordingly, it has darkened the nature of the difficulties which it was contrived to express; and, therewith, it has obscured that pregnant distinction between statute and judiciary law with which we are presently occupied. It needs, therefore, the exact examination which I now shall bestow upon it.

Two distinct difficulties, incident respectively to two distinct processes, are denoted by the phrase as it is usually applied. Of these distinct difficulties, one is incident to the application of statute or judiciary law already obtaining or existing: the other is incident to the decision of a specific or particular case for which the existing law affords no applicable rule. The former may perplex the judge in his purely judicial character, or as properly exercising his properly judicial functions: the latter may embarrass the judge in his quality of judicial legislator, or as virtually making a rule for cases of a new description. As it is usually applied, the phrase is confined to the difficulty which is incident to the application of law, with the difficulty which is incident to judicial legislation. But a difficulty resembling these is incident to direct legislation, or the process of creating a statute. And this difficulty may be styled, as properly as the two others, a competition of opposite analogies.

I first shall consider the difficulty which is incident to the application of law already obtaining or existing; though the difficulty which is incident to judicial legislation is probably the difficulty that Paley particularly contemplated.

Having considered the difficulty which is incident to the application of law, I shall proceed to consider the difficulty which is incident to judicial legislation, and also the resembling difficulty which is incident to the creation of a statute.

The system of positive law obtaining in any nation (or the complexion or collective whole of its positive law) is a body or aggregate (methodized or unmethodized) of various but connected rules. Now every rule which is definite or precise, is applicable to cases of a class (or governs cases of a class) which also is definite or precise. For the rule is shaped exactly to the essence or nature of the class, or to the essentials, positive and negative, possessed by a case of the class: meaning by the positive and negative essentials of the case, the properties which it necessarily has, and the properties which it necessarily wants, in so far as it belongs to the class, and in so far as the rule will apply to it. And as the rule is shaped exactly to the essence or nature of the class, so is the essence of the class exactly marked by the rule: the determinate purpose of the rule, and the determinate import of the rule, fixing the class of cases which its author intended it to govern. Consequently, if every rule in a system of law were perfectly definite or precise, every specific case that the whole of the system embraced would belong to a kind or sort perfectly definite or precise.

On the appearance of any case that the whole of the system embraced, the class to which it belonged, and the rule by which it was governed, might be known and assigned with certainty; or, (at the least,) the class and the rule might be known and assigned with certainty, by every discerning lawyer who had mastered the system thoroughly. But the ideal completeness and correctness which I now have imagined, is not attainable in fact. More or fewer of the rules which constitute a system of law, and more or fewer of the cases which the whole of the system extends to, are inevitably framed and classed more or less indefi-

nitely. What exactly are the cases which a given rule applies to, or what exactly is the rule which governs a given case, is a doubt that would arise occasionally, and would not be soluble always, though the system had been built and ordered with matchless solicitude and skill. And hence arises, or hence arises mainly, the difficulty which I now am considering: a difficulty incident to the application of law, and not to the creation of law by judicial or direct legislation.

In order to an analysis of the difficulty which I now am considering, we will suppose that the rule A is not perfectly definite; or, (what is the same thing expressed in a different form,) that the essence of the class of cases which A was intended to govern is not marked by A with perfect exactness. Further, we will suppose that the rule B, with the essence of the class of cases which B was intended to govern, is in the same plight of uncertainty. Moreover, we will suppose that the case *x* demands judicial decision: that *x* in certain respects bears a likeness to the cases which seem to be governed by A; but that *x* in other respects bears a likeness to the cases which seem to be governed by B. Lastly, I will suppose that the judge, distracted by the two likenesses, doubts whether A or B be the rule applicable to *x*.

Now, the difficulty which stays the judge from applying the law to the fact, may be called (in metaphorical language) "a competition of opposite analogies." For the likeness of *x* to the cases which seemingly are governed by A, and the likeness of *x* to the cases which seemingly are governed by B, may be deemed two opposite suitors contending for the preference of the judge: the former entreating the judge to decide *x* by A, and the latter imploring the judge to resolve *x* by B.

The difficulty arises, however, from the indefiniteness of the two rules. For if the rule A be the rule applicable to *x*, (or if the rule B be the rule applicable to *x*,) *x*, in respect of

A, (or *x*, in respect of B,) is in the following double predicament. It has *all* the positive essentials possessed by cases of the class which the rule was intended to govern: And, moreover, it has *no* property or character through which it differs from those cases essentially or materially: that is to say, through which it differs from those cases in such wise and degree as render a common rule inapplicable to it and them.

Consequently, if the rules A and B be perfectly definite, and the classes of cases which they govern be therefore perfectly definite, the judge can arrive with certainty at one of the following conclusions: namely, that *x* is in that predicament in respect of the rule A, and therefore must be solved by A; or that *x* is in that predicament in respect of the rule B, and therefore must be solved by B; or that *x* is *not* in that predicament in respect of either of those rules, and therefore must be solved by a third, if a third that applies may be found. The difficulty arises, therefore, from the indefiniteness of the two rules; and is rather a competition or conflict of those indefinite rules, than of the opposite analogies of *x* to the cases of the indefinite classes.

To the foregoing analysis of the difficulty which I now am considering, I append the following explanations.—To render my supposed example as simple as possible, I have imagined that the indefinite rules which strive for the preference of the judge are only two. But, though a greater number of such rules strive for the preference of the judge, the hindrance to the application of the law is substantially the one which I have analysed. The greater, however, is the number of the indefinite and conflicting rules, the greater, of course, is his difficulty. The greater, of course, is his difficulty in subsuming the case before him under the appropriate rule; or in finding that the case before him is embraced by none of the rules of which the law that he administers is actually composed.

Although it arises more frequently from a conflict of indefinite rules, the difficulty which I now am consider-

ing (or a difficulty essentially like it) may arise, without such a conflict, from a single indefinite rule. For it probably has happened, where a rule or principle is indefinite, that some judges have applied it to certain specific cases, whilst others have withheld it from cases essentially similar to the former. In other words, the rule has been applied to some, and withheld from other cases, though all the adjudged cases are of one description or category. Now if *x*, a case in controversy, be of that description or category, it bears a likeness to the cases to which the rule has been applied, and also a likeness to the cases from which the rule has been withheld. And though the likenesses are identical in relation to the various cases, they yet are opposed and contending in relation to the indefinite rule: one of them inviting the judge to apply the rule to *x*, and the other suggesting to the judge that the rule is inapplicable to it.

But the difficulty which stays the judge, springs from the indefiniteness of the rule. Supposing that the rule is judiciary, the difficulty implies that the existence of the rule is questionable; or, at least, has been disputed by the judges who have refused to apply it. For the rule itself is made by decisions (if it exist at all). Supposing that the rule is perfectly definite, the judge may determine certainly (if not easily and quickly,) how he should dispose of the case which awaits his judicial solution. It surely is, or it surely is not, of the class which the rule was intended to govern.

We have assumed tacitly, up to the present point, that the competition of opposite analogies which is incident to the application of law arises exclusively from the indefiniteness of a rule or rules. But it may possibly arise from a somewhat different cause: namely, the inconsistency *inter se* of several definite rules, or the intrinsic or self-inconsistency of one definite rule. Or, (what, in effect, is exactly the same thing,) it may possibly spring

from the inconsistency with which such rules or rule have been administered or applied. Of two cases, for example, which belong to one category, and which therefore should have been adjudged by one and the same rule, the one may have been decided by a definite or precise rule and the other by a definite rule essentially different from the former. Or, supposing a single rule which is perfectly definite or precise, it may have been applied to one, and withheld from another case, though the two adjudged cases are of one description or class.

Now, on either of these suppositions, it may happen that a case in controversy is essentially similar to the cases which have been resolved inconsistently. But, assuming that a case in controversy is essentially similar to those cases, it bears a likeness to one of them, and the same likeness to the other; which respective likenesses, though identical in relation to the cases, are opposed and contending analogies in relation to the rules or rule.* Consequently the difficulty may spring from the inconsistency of several definite rules, or from the intrinsic inconsistency of a single definite rule. But, though it may spring from inconsistency which is not an effect of indefiniteness, it commonly springs from inconsistency of which indefiniteness is the cause: that is to say, it commonly springs from the inconsistency of several indefinite rules, or from the intrinsic inconsistency of a single indefinite rule. For the inconsistency in rules which is not an effect of their indefiniteness, is generally an evil that is easily corrigible.

Generally, therefore, a system or body of law is kept passably free from it by direct or judicial legislation. But the inconsistency in rules which is caused by their want of precision, is often an invincible malady, or a malady difficult to

* If two cases essentially different have been decided by a common rule, a competition of opposite analogies cannot arise from the inconsistency. For if a case in controversy be essentially similar to either, it is essentially different from the other, and not essentially like it.

heal.* It often inheres in the purpose of a rule, and therefore is simply incurable. And where it is susceptible of cure, (which far more often is the fact,) it can seldom be expelled from the system without a solicitude and skill which lawgivers, direct or judicial, have rarely felt and attained to.

It appears, then, from the foregoing analysis, that the competition of opposite analogies which is incident to the application of law, arises from this: that a rule in the system of law which the judge is engaged in administering, is inconsistent with itself; or that two or more of the rules which actually compose the system, are inconsistent with one another. It appears, also, from the same analysis, that the rule or rules are commonly thus inconsistent, because, inevitably or otherwise, it or they are indefinite; but that the rule or rules are occasionally thus inconsistent, although it or they are perfectly precise.

From the competition of opposite analogies which is incident to the application of law, I turn to the similar difficulty which is incident to judicial legislation.

(*The rest wanting.*)

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* Rules involving degrees: *e.g.* libel, lunacy, prodigality, reasonable time, reasonable notice. These are hotbeds of competing analogies. The indefiniteness is incorrigible. A discretion is left to the judge. Questions arising on them (and all competitions of analogies) are questions of law: *e.g.* they regard the applicability of an uncertain or inconsistent rule or rules to a given and known fact. They are hardly questions of interpretation or induction, for though the rule were explored and known as far as possible, doubt would remain.

EXCURSUS ON ANALOGY.

EXCURSUS ON ANALOGY.

(Analogical Reasoning and Syllogism.)

Having analysed the equivocal phrase of which we have treated in the text,* we will here review the meanings (or rather the principal meanings) of the equivocal term which it involves: namely, the term Analogy.

1. As taken with the largest, and perhaps the most current of its meanings, the term analogy is coextensive with the term likeness: In other words, it signifies likeness or resemblance of any nature or degree. The process, for example, of reasoning, which we shall scrutinize hereafter, may be grounded on a likeness or resemblance of any nature or degree; and whatever be the nature or degree of the given likeness or resemblance, the reasoning which is grounded upon it is styled reasoning by analogy. Moreover, the term analogy, as borrowed by the Romans from the Greeks, often signifies a reasoning which is grounded on a likeness or resemblance, instead of the likeness or resemblance whereon the reasoning is grounded. And analogy, as meaning such reasoning (or the consequent yielded by such reasoning) receives from the Roman Varro, (treating of its etymon and value,) the following extensive definition: "Veritas et ratio quæ a *similitudine* oritur."

2. Between the *species* or sorts which are parts of a *genus* or kind, there obtains a resemblance or likeness whereon the *genus* is built; or (changing the phrase) between individuals of any, and individuals of any other of those sorts, there obtains a resemblance or likeness by which they are

* See Lecture XXXVII., Vol. II. (*ante*).

determined to the kind. Moreover, between individuals or singulars as parts of any one of those *species*, there obtains another resemblance, which is the ground or basis of the sort. For example: Between the various *species* which are parts of the *genus* animal, (or between individuals of any, and individuals of any other of those *species*,) there obtains a resemblance or likeness which determines them to the *genus* animal. And between individual men, as belonging to a sort of animals, there obtains another resemblance which determines them to the *species* man.

The resemblance between the *species* which are parts of a *genus* or kind (or between individuals of any, and individuals of any other of those *species*) is styled, in the language of logicians, *generic*. The resemblance between individuals as parts of any one of those *species* is styled, in the language of logicians, *specific*.

Now the likeness between any of the sorts which are parts or members of a kind (or between individuals of any, and individuals of any other of those sorts) is commonly contradistinguished, under the name of *analogy*, to the likeness between individuals as parts of any one of those sorts. For example: The likeness of a man to any of the lower animals, as distinguished from the likeness of a man to any of the human species, is commonly called analogy. Again: The term intellect, when it is used emphatically, denotes the human intellect. But between the intellect of men and the intellect of the lower animals there obtains a generic resemblance. Accordingly, the intellect of the lower animals is styled an "*analogon* intellectûs": that is to say, a something which resembles generically the intellect of the human species, or the peculiar and preeminent intellect which is called intellect emphatically. Again: In relation to the several titles from which they respectively arise, an obligation *ex contractu* and an obligation *quasi ex contractu* are obligations of different species. But these two different species are parts of a common *genus*: namely, the *genus* of *ob-*

ligationes (in the sense of the Roman lawyers). Accordingly, an obligation *quasi ex contractu* (as the adverb *quasi* imports) is an *analogon* of an obligation annexed by the law to a contract.

It follows from what has preceded, that when we denote by the term *analogy* a generic and remoter resemblance between individuals or singulars, we make the following suppositions concerning the compared objects. First: That one or some of those objects are parcel of a given class, which, for the purpose in hand, we deem a *species:* that is to say, a class consisting exclusively of mere individuals or singulars, and not containing or comprising lower or narrower classes. Secondly: That the other or rest of those objects are not of that given species. Thirdly: That all the compared objects are parcel of a given *genus* by which that species is embraced.

3. Two or more objects may bear to another object, (or they may bear respectively to several other objects,) similar though several relations. Thus, *A* may be related to *x*, as *B* is related to *x;* or *A* may be related to *c* (or to *c*, *d*, and *e*), as *B* is related to *x* (or to *x*, *y*, and *z*). Now where several objects are thus related similarly, they bear to one another a likeness lying in a likeness of their relations. And this resemblance of objects, lying in a resemblance of their relations, has been named by Greek and Latin, and also by modern writers, *analogy:* by Latin writers, translating from Greek, *proportio.*

Where objects are allied by a likeness lying in a likeness of their relations, the objects may be connected, or the objects may not be connected by a likeness of a different nature. On either, however, of these suppositions, the objects are parts of an actual, or a possible *genus* or *species*, built on the likeness of their relations. For a likeness of objects which lies in a likeness of their relations, as well as any other likeness connecting the objects with one another, may form a reason or ground for putting them together in a class.

Of the analogy or likeness of objects which lies in a likeness of their relations, the following examples are specimens.—The fin of a fish and the wing of a bird are *analogous* objects: the fin being to the fish, in respect of its movements through the water, as the wing is to the bird, in respect of its movements through the air. There also obtains an *analogy* between an egg and a seed: for the egg is related to the mother, and to the incipient bird, as the seed is related to the generating, and to the inchoate plant. Where several legal cases are included by a law or principle, their similar though several relations to the law or principle which includes them, make them *analogous* cases. Thus, the several specific cases actually comprised by a statute; or the several specific cases comprised by a judiciary rule, carry a mutual *analogy*, or a mutual parity or æquity, in respect of their like relations to the statute or rule of law.

Again: We may suppose that the author of a statute, when he is making the statute, omits some class of cases falling within its reason. Now, on this supposition, a case which is thus omitted and a case which the statute includes, bear to the reason of the statute similar though several relations. And in respect of their similar though several relations to the reason, the omitted and included cases are *analogous*, æqual, or *pares*.

But here, to prevent misconception, I must add the following remarks.—The several specific cases which are actually comprised by a statute, or the several specific cases which are comprised by a judiciary rule, are therefore *analogous* or *pares*: for the respective relations of the cases to the statute or rule which includes them are similar though several relations.

But when it is said of a litigated case, that it bears an analogy or parity to another case or cases, it commonly is not intended that the doubtful and litigated case is surely and indisputably included by a statute or rule in question. It commonly is meant that the litigated bears to the other

case a specific or generic likeness; and that the former ought to be decided on account of the alleged resemblance, by a statute or rule in question on account of the resemblance alleged. Or else it is meant that the litigated bears to the other case a specific or generic likeness; but that the former ought *not* to be decided, although the resemblance is admitted, by a statute or rule in question, notwithstanding the admitted resemblance. Consequently, the asserted or admitted analogy of the litigated case to the other is not an analogy or parity lying in a likeness of their relations; or, at the least, it is not an analogy or parity lying in a likeness of their relations to a given statute or rule indisputably including both.

In truth, when it is said that a litigated case is *analogous* to another case, one of the following meanings is commonly imported by the phrase. It is meant that the litigated case bears to the other case, a specific and proximate resemblance; and that the former ought to be decided, on account of the alleged resemblance, by a given statute or rule in which the latter is included. Or else it is meant that the litigated bears to the other case a generic and remoter resemblance; and that the former should be brought or forced, on account of the alleged resemblance, within a statute or rule by which the latter is comprised: that is to say, that a new rule of judiciary law, resembling a statute or rule by which the latter is comprised, ought to be made by the Court, and applied to the case in controversy.

In any of the meanings which we have reviewed above, the term analogy signifies likeness: namely, likeness or resemblance of any nature or degree; generic and remoter likeness, as opposed to specific and proximate; or a likeness of several objects, lying in a likeness of their relations. In any of the meanings which we shall review below, the term analogy denotes an intellectual process: a process

which is caused or grounded by or upon an analogy (in one or another of the meanings which we have reviewed above).

1. Analogy denotes the analogizing of several analogous objects: that is to say, the considering the several objects as connected by the analogy between them.

2. Analogy denotes an inference, or a reasoning or argumentation, whereof an analogy of objects is mainly the cause or ground.

The nature of the inference, or reasoning, may be stated or suggested thus. Two or more individuals, or individual or singular objects, are allied by a given analogy. It is known (or, at least, is assumed,) before and without the reasoning, that a given something is true of one or some of these objects. But it is *not* known, before and without the reasoning, that the given something is true of the other or rest of these objects. From the given analogy, however, which connects these objects with one another, the following inference is drawn: Namely, that the given something which is true of one or some of these objects, is true of the other or rest. Or the nature of the inference or reasoning may be stated or suggested thus:—*A* is *x* and *y* and *z*. An analogy or parity obtains between *A* and *B*; for *B* as well as *A* is *x* and *y*. We know, (or, at least, we assume,) before and without the reasoning, that *A* is also *z*. We do not, however, know, before and without the reasoning, that *B* is also *z*. But, since *B* as well as *A* is *x* and *y*, and we know, the reasoning apart, that *A* is also *z*, we infer, by analogy or parity, that B is also *z*. In short, from two antecedents or *data* which are known independently of the reasoning, we argue or proceed to a consequent which is unknown without it. From our knowledge that several objects are connected by a given analogy, and our knowledge that a further something is true of one or some, we infer that the further something is true of the other or others.

From the following passage in Quinctilian, it seems that

the Roman writers, as borrowing a term from the Greek, styled the *reasoning in question, analogy;* and that the Roman writers styled such reasoning *proportio,* (sometimes also *comparatio,*) when they turned the Greek expression into its nearest Latin equivalent. "*Analogiæ,* quam proxime ex Græco transferentes in Latinum *proportionem* vocaverunt, hæc vis est: Ut id, quod dubium est, ad aliquid simile, de quo non quæritur, referat; ut incerta certis probet."—Inst. Orat. L. I. c. 6. We have already quoted the definition of the term, given by the etymologist Varro; agreeably to his definition, analogy signifies the consequent yielded by the reasoning in question, rather than the reasoning itself.

But though the reasoning in question is styled *analogy* or *proportion,* it is styled more commonly reasoning by analogy or else analogical reasoning: *ratiocinatio per analogiam* or *argumentatio analogica.* It is styled also reasoning by parity; and since *equality* or *æquity* is tantamount to *analogy* or *parity,* it might be styled moreover reasoning by equality or æquity.

And here I may remark that the homely phrase *to liken,* or *to liken one thing to another,* is equivalent to the finer phrase to reason by analogy or parity. We know that several objects are like in certain respects: We know that a something is true of some of these objects, although we do *not* know that the same is true of the others: From our knowledge that the former and the latter are like in certain respects, and our knowledge that the given something may be truly affirmed of the former, we infer that the given something may be truly affirmed of the latter. Now here in homespun English, we *liken* the latter to the former: that is to say, we argue them like the former in one or more respects, since we know them, the inference apart, like the former in others.

In a case of analogical reasoning, the analogy of the compared objects may lie in a resemblance of their relations, or in another resemblance. On either of the two suppositions, the resemblance may be specific, and comparatively close or strong, or the resemblance may be generic, and comparatively distant or faint. In other words, the objects from which we infer, and the objects to which we argue, may be parts of one species: or the former may belong to a *species*, parcel of a given *genus*, and the latter to another *species*, parcel of the same *genus*. Whatever be the nature of the likeness on which the reasoning is grounded, or whatever be the degree of the likeness on which the reasoning is grounded, the reasoning may be called with propriety, as it commonly is called in practice, *reasoning by analogy or parity*.

But such analogical arguments as are grounded on specific resemblances, and such analogical arguments as are grounded on generic resemblances, are not unfrequently distinguished by the following antithesis of phrases. An inference from singulars of a sort, is grounded, it is said, on *experience*. An inference from singulars of a sort which is parcel of a given kind, to singulars of another sort which is parcel of the same kind, is grounded, it is said, on *analogy*.

For example: It is said that a physician would reason from *experience*, in case he reasoned thus: "Some men have died, or have suffered some other harm, on taking a certain drug; therefore, other men will die, or will suffer a like harm, if the drug be taken by them." It is said that he would reason from *analogy*, in case he reasoned thus: "Some animals of one of the lower sorts have died of a certain drug; therefore men will die of the drug, if it be taken by them."

But such analogical arguments as are grounded on specific resemblances, and such analogical arguments as are grounded on generic resemblances, are vaguely divided

by a difference which is merely a difference of degrees. There is not the opposition of natures between the two classes of arguments, which seems to be expressed or intimated by the foregoing antithesis of phrases. For whether the likeness be specific or generic, an argument raised on a likeness rests upon two antecedents: first, the likeness between the objects from which we reason or infer, and the objects to which we argue; secondly, the given and further something which we know or assume of the former, and which, by analogy or parity, we impute or ascribe to the latter.

Now, whether the likeness be specific or generic, each antecedent is known to us (either directly or mediately) by or through an experience which has occurred to ourselves or others. Consequently, whether the likeness be specific or generic, the reasoning is built on experience, and also is built on analogy. In respect of either antecedent, the reasoning is built on experience. In respect of that antecedent which consists in the likeness of the objects, the reasoning is built on analogy with which experience presents us. We know, indeed, through experience, (helped by analogical reasoning,) that such analogical arguments as rest on specific resemblances, are commonly worthier of trust than such as rest on generic. But this extremely vague, though extremely important difference, is merely a difference of degrees. Although an analogical argument raised on a stronger resemblance may be surer than a similar argument raised on a weaker resemblance; the natures of the several arguments are essentially like or identical.

We will divide analogical reasoning into two principal kinds.

As concerned with matter of a nature which we shall endeavour to explain, analogical argumentation (supposing

it justly conducted) is only contingently true: Or (changing the phrase) the something which is true of the object from which we reason or infer, is only probably true, or only contingently true, of the objects to which we argue.

As concerned with matter of another nature, which we shall also endeavour to explain, analogical argumentation (supposing it justly conducted) is necessarily or certainly true: Or (changing the phrase) the something which is true of the objects from which we reason or infer, is certainly or necessarily true of the objects to which we argue.

Analogical reasoning of the former kind we will call analogical reasoning concerning *contingent* matter. Analogical reasoning of the latter kind we will call analogical reasoning concerning *necessary* matter. We incline to believe that the latter is not commonly called analogical reasoning, and it certainly differs essentially from analogical reasoning concerning contingent matter. Accordingly, we have hitherto assumed, in treating of reasoning by analogy, that all analogical reasoning concerns contingent matter.

But to this we shall return below.

[Analyse analogical reasoning of the first kind, and compare it with syllogism and perfect induction, and with analogical reasoning (if such it can be called) which is concerned with necessary matter.]

I must now endeavour to distinguish Contingent from Necessary Truth.

Contingent Truth is truth not inseparable from a notion of the object: Our belief resting, not on a necessary connection of truth with the object, but on experience and observation (one's own or others') of their invariable or customary conjunction: such as the experience of pleasure or pain as connected with objects of a given class: Our belief or expectation of future conjunction being (at least after experience) proportioned to the degree in which, in times

past, conjunction has approached to invariableness. *E. g.* The death of men is expected with perfect confidence; but the effect of a drug on the human body, or of an object on the human mind, in the way of pleasure or pain, is expected with less confidence. The nature of the belief or expectation derived from past conjunctions, is not within the province of the logician, who takes the facts from the philosophy of the human mind. The belief or expectation seems to be confident before experience, and to be afterwards reduced to experience; widened by analogical reasoning founded on generic resemblance. It will be admitted by all, that our belief ought to be commensurate with the experience; *e.g.* with the proportion borne by individual instances *in which* the conjunction has been experienced, to individual instances *in which it has not.* Whether our belief is first absolute and then proportioned to experience, or is first hesitating and gradually proportioned to experience, is not a question falling within the range of the logician.

In ordinary language, contingent truths are certain or probable. As opposed to necessary, *all* are contingent, in the sense above explained; but according as truth is accordant with *all* past experience, or only accords with past experience *generally*, it is certain or probable.

A contingent or probable truth does not necessarily belong to the object, although in fact no object of the sort has been known without it.

Necessary Truth is that which is true of all objects, like the objects argued from, by reason of their having that wherein they are analogous. A necessary efflux of *that;* a something without which the object cannot be conceived as having *that.* [*e.g.* Triangles, as such. (Hobbes.) Law case of a class, as such: *i. e.* as abstracted from its individual peculiarities. Legal consequence true of it, etc.]

In all these cases the truth seems to be *proprium* or property, strictly so called. It flows necessarily from the

essence of the object: *i. e.* from the properties (positive or negative or both) which make the object to be of the class to which it belongs: Although it is not itself of the essence: *e.g.* equality of the three angles of any triangle, etc.

Or, legal consequence deducible from a case.

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Analogical Reasoning concerning Contingent Matter.

In pursuance of the order suggested above we shall proceed to analyse analogical reasoning concerning contingent matter.

1°. Induction; *i. e.* analogical reasoning extended to all other objects, (or other objects generally and indeterminately,) having the given analogy to the object or objects argued from. (Call it, at present, imperfect induction, or induction simply; being totally different in nature from what is commonly called perfect induction, and to which we shall advert below in conjunction with syllogism.)

2°. Analogical argument not involving any such universal or general illation; but regarding one or some individually determined singulars, having the given analogy to the objects argued from.

This latter, as opposed to induction, may be called particular reasoning; and may be drawn without adverting to others generally. But in so far as it will hold, it supposes that the truth applies universally or generally, and indeterminately.

The degree of assurance with which the particular conclusion may be embraced is proportioned to the approach to universality. *E.g.*: *A* has *x* and *y*. *A* has also *z*. *B* has *x* and *y*. *Ergo*, *B* has *z*. But why? Because all objects having *x* and *y*, or objects generally having *x* and *y*, have *z*: insomuch, that *B* is, certainly or probably, one of a number of objects having *z*.

This is what we do when we attempt to state the grounds of our inferences. Also, when, in confuting others, we suggest a contradictory case or cases. Immense importance of the habit: Most people being apt to assume from

a few cases universally, and then to syllogize. This leads me to compare syllogism as concerned with contingent matter, and particular analogical reasoning as concerned with the same.

[Distinguish analogical reasoning which is concerned with contingent matter, from syllogism and perfect induction, of which the matter is also contingent.

Analyse analogical reasoning (induction and particular) concerning necessary matter, and compare it with induction (necessarily perfect) and syllogism (necessarily concluding absolutely) as concerned with the same.]

In analogical reasoning as concerned with contingent truths, the truth or probability of the inference depends on two causes: namely, the truth of the two antecedents, and the invariable or customary connection of the second antecedent with other singulars like those from which we argue. If the antecedents are true, and the conjunction invariable, the inference is certain: *i. e.* has the certainty which alone can belong to contingent truth (as explained above).

If the antecedents are true and the conjunction *not* invariable, the inference recedes from certainty in proportion to the recess from invariableness.

[Give examples of both cases.]

All analogical reasoning proceeds from a singular to a singular, or singulars, or from singulars to singulars, or a singular. But when we infer from singulars or a singular to one or some, it is usually called "reasoning," or "particular reasoning." When, from a singular or singulars to the rest of the actual or possible class, "induction."

[Give example.]

But in every case, the process is essentially the same. For the confidence in a particular conclusion depends upon the approach to invariableness of conjunction: *i. e.* upon the possibility of an induction approaching to truth. Many inductions are founded directly on an analogy: *e. g.* What

is true of one of a species, is true of other individuals. But this again rests ultimately on experience.

* * * * * * * *

It appears from what has preceded, that reasoning by analogy or likeness (of any nature or degree) is grounded on two antecedents: first, the likeness between the objects *from* which we reason or infer, and the objects *to* which we argue; secondly, the something, which, (the inference apart,) we know to be true of the former, and which, by analogy or parity, we impute or ascribe to the latter. But though these two antecedents are immediately the ground of the inference, the inference reposes also on a further or ulterior basis. For why do we argue from the likeness between the compared objects, and the something which we know to be true of one, or some, of the objects, that the something is true moreover of the other, or rest of the objects? The nature of the ulterior basis on which the inference reposes is determined by the nature of the matter with which the inference is concerned.

In [some] cases of reasoning by analogy the truth of the analogical inference (supposing it deduced justly) is contingent or probable: that is to say, the something that is true of the objects which the just inference is brought from, is contingently true of the objects to which the inference is carried. In other cases of reasoning by analogy, the truth of the analogical inference (supposing it deduced justly) is necessary or certain: that is to say, the something that is true of the objects which are justly argued *from*, is necessarily true of the objects which are justly argued *to*.

Analogical Reasoning as concerned with contingent Matter, distinguished from Syllogism and perfect Induction as concerned with the same.

Whatever there has been of reasoning, as meaning process from known to unknown, has been performed by an

analogical argument (an induction), by which we obtained the major premiss.

(Give example.)

And, moreover, in contingent matter, syllogism is apt to mislead. It rarely happens that the major premiss can be universal, conformably with material truth, though the formal truth of the conclusion depends on assuming such material universality.

(Give example.)

Since then syllogism can give us no new truth, and since it may mislead, what is its use?

I incline to think that the important part is not syllogism. But terms, propositions, definitions, divisions (abstracted from all particular matter) are all important. It is a great error of most logicians to consider these as merely subordinate to syllogism, which is the most futile part. From my friend John Mill, who is a metaphysician, I expect that these, and analogical reasoning and induction, abstracted from particular matter (which are the really practical parts), will receive that light which none but a philosopher can give. For though logic is a formal science, and takes its truth from others, none but a metaphysician can determine its boundaries or explicate it properly.

[Necessity for illustrations from numerous sciences.—Many of the methods seemingly peculiar, would be found universal or general.]

A something equivalent, or nearly approaching, to syllogism, always happens when we state in our own minds the grounds for a conclusion in a particular reasoning: *e.g.*:

A is *x* and *y*. *A* is also *z*. *B* is *x* and *y*. *B*, *ergo*, is also *z*. But why? Because all singulars being *x* and *y* are also *z*, or singulars being *x* and *y* are generally and indeterminately *z*. In other words, we can only infer from *A* to *B*, on the supposition that *A* is the representative of a whole class, or of singulars generally contained in a class. The argument, therefore, must be put thus: All singulars being

x and y, or the singulars generally which are x and y, have z. The singular or singulars forming the subject of the inquiry are z. Therefore, certainly or probably, B is z. And this would be much more convenient than the ordinary syllogism, which assumes in the major premiss a universality commonly false in fact, and which, therefore, must be denied again in the conclusion. For the conclusion, in fact or materially, cannot be absolute, unless the universality assumed in the major premiss be materially true.

[Use of syllogism (or analogous process), in leading us to review grounds: In confutation:—reminding antagonist that he has assumed something not tenable.]

But, in fact, we never syllogize, though we perform an analogous process. We run the mental eye along the analogous objects, and if we find them contradictory, etc., we conclude probably, or reject, unless we find special reason. Hence Locke's sarcasm.*

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In all particular analogical reasoning which is concerned with contingent matter, the truth of the inference (considered as such), depends on the truth of the antecedents (and on something else). And what I have said of syllogism, as to the dependence on terms and propositions, applies to perfect induction. As in syllogism, true of all, true of every, so in induction, true of every, true of all: *Vi materiæ, vi formæ* [materially or formally]. It follows that by syllogism we can arrive at no new truth, the conclusion being involved in the major premiss. We merely affirm of one what we had affirmed of all, including one. Or we merely affirm that the subject of the conclusion is one of the all, of which, in the major premiss, we had affirmed the predicate of conclusion.

* See 'Essay on the Human Understanding,' vol. ii. c. xvii. § 4.

Analogical Reasoning (Induction and particular) as concerned with Necessary Matter. The Induction necessarily perfect. Syllogism as employed about the same matter.

Now here we merely reason from a singular to a singular, as in the case of contingent truths. But the argument carries with it all the apodictic certainty which belongs to a syllogistic inference.

For *A* is *a* and *b*. *A* is also *x*: and *A* has *x* in such wise that every singular like it in having *a* and *b*, must have *x*. *B* is analogous to *A*, in having *a* and *b*. Therefore *B* is of necessity *x*.

It is manifest that this is equivalent to the following syllogism. Every singular which is *x* is also *z*. *B* is a singular which is *x*. Therefore, *B* is also *z*.

But still there is this difference, that though, like a syllogism, the inference follows *formaliter*, it also follows *materialiter*. So that the cogency lies in the truth of the antecedent, and not in the relation and disposition of the terms. And, on the other hand, it differs from an analogical argument concerning a contingent truth. For the antecedent necessarily imports the consequent. Analogical reasoning is generally considered as being conversant about contingent matter, and therefore I have so considered it.

[Futility of syllogism in these cases.]

Much of the certainty ascribed to mathematical reasoning lies in the truths with which it deals being of this class. Or at least, in approaching so near them that the deviations may be thrown aside, and afterwards allowed for in the way of limitation to the inference. This is also the case with many of the truths with which lawyers have to do. And hence Law (*teste Leibnitz*), much like mathematics.* In either case, the cogency arises from the nature of the premiss.

* Leibnitz, Epist. ad Kestnerum. See quotation, *post*.

[Eulogy on Law, from being connected, on the one hand, with Ethics and Religion, and on the other, not less fitted to form the mind to habits of close thinking than the most abstruse of the mathematical sciences. Also, to exercise the mind in evaluation of evidence regarding contingent truths.]

* * * * * * * *

For example: Interpretation of part of a statute by another part: *interpretatio secundum analogiam scripturæ* (so called as applied to a statute, or to any other written document). Interpretation of a statute by a statute made by the same legislature *in pari materiâ: interpretatio secundum analogiam scriptoris* (genuine interpretation).*

. . . The last, an inference resting in speculation. But often, a practical consequence built upon a perception and comparison of analogous objects; *e.g. similis similium declinatio.*

The extension of a statute, etc., *ex ratione legis,* is an example of analogical interpretation (genuine).

Lower animals reason,—how? The process of inference which they employ ought to be called reasoning. They also compare and abstract, as a necessary forerunner to inference.

Description of perfect induction.

The same remarks apply. The consequent is contained in the premiss.

It follows not from the form, but by reason of the matter. For because *A* and *B* are *x* and *y*, and *A* is always *z*, it is not true that *B* is also *z*. Whatever truth there is, therefore lies, not in the form of the reasoning, but in the intrinsical truth of the antecedents: *i. e.* because the antecedents are intrinsically true, we infer the truth of the consequent.

In syllogism and perfect induction, that is, in formal argumentation, the conclusion follows, *ratione formæ.*

* For the analogy of grammarians, see Stewart, 249–50. Johnson, "Analogy."

In material argumentation, the conclusion follows *vi materiæ.*

Syllogism.

Endeavouring to suggest an answer to this pregnant and difficult question,* we begin with discriminating, as sharply and clearly as we can, *formal* and *material* reasoning. By "*formal* reasoning," (the propriety of which expression will appear hereafter,) we signify the process of *syllogism*, with the process of *formal induction*. The natures of these processes (to which we shall revert below) may be indicated briefly in the following manner. In the process of syllogism, a narrower proposition is extracted, by a formal and necessary inference, from a larger and universal proposition which contains the narrower implicitly: In the process of formal induction, a universal proposition is collected, by a formal and necessary inference, from *all* the singular propositions of which the universal is the sum.

By "*material* reasoning," (the propriety of which expression will also appear hereafter,) we denote analogical reasoning in each of its principal kinds: namely, the reasoning which yields a consequent that is either singular or partial, and the reasoning which yields a consequent that is either universal or general. Of the difference between these processes (to which we shall revert below) the following is a brief description.—In every reasoning raised on a likeness or analogy, the analogical inference proceeds from an assumed singular or singulars to another singular or singulars: that is to say, it proceeds to one or more of all those various singulars which are connected by the given analogy with the singular or singulars assumed. But where it yields a consequent which is either singular or partial, it proceeds to one or a few of all those various singulars.

* The question asked by one of the class; (apparently Mr. John Mill:) viz. "What, then, is the use of syllogism?"—*S. A.*

Where it yields a consequent which is either universal or general, it proceeds without exception, to all those various singulars, or to all those various singulars, with more or less of exception.

We venture to name the inference which is merely singular or partial (or which yields a conclusion or consequent that is merely singular or partial,) *reasoning by example.* For it seems identical with the process which logicians denominate *exemplum,* and which they describe usually in some such words as the following:—"Argumentatio in quâ unum singulare ex alio colligitur." The universal or general inference is called emphatically *induction,* and is usually described by logicians in some such words as the following:—"A singulari ad universale progressio." To distinguish it from the formal induction which is a necessary induction or inference, we style it *material induction.* And here we must remark, that in treating of argumentation of any of the above-mentioned sorts, we always assume (unless we express the contrary) that the inference which we are considering is perfectly good or legitimate: that is to say, that the consequent has all the truth, in nature or in degree, which the natures of the reasoning and the case will allow the reasoner to reach.

With this remark, we pursue our attempted discrimination of *formal* and *material* reasoning: of the process of *syllogism,* with the process of *formal induction,* and the process of *reasoning by example,* with the process of *material induction.*

In any legitimate syllogism of any figure or mode, the process of argumentation is virtually this. In the major proposition, or major premiss, we affirm or deny a something of *all* the individuals or singulars which constitute a given class. In the minor proposition, or minor premiss, we assume and affirm of a number of individuals, that they are *some* of the individuals which constitute the given class; or

we assume and affirm of a single individual, that it is *one* of the individuals which constitute the given class. In the consequent proposition, or conclusion, we affirm or deny of the subject of the minor, what we affirmed or denied of the subject of the major.

Or the process of affirmation or negation which we perform in the conclusion, may be stated more clearly thus: What, in the major, we affirmed or denied of the *all*, we affirm or deny of the singulars or singular, which, by the assumption in the minor, are *some* or *one* of the all. Where a syllogism is affirmative, the process of argumentation runs in the following manner:

"Every *A* (all *A*'s constituting the given class) is *x*. But every *B* is an *A*: that is to say, *all* the singulars of the narrower class constituted by all *B*'s, are *some* of the singulars of the larger class constituted by all *A*'s. Therefore, every *B* is *x*."

"Every *A* is *x*. But some *B*'s (of which the quantity or number is *not* determined) are *A*'s; or some *B*'s (of which the quantity or number *is* determined, but which are not determined individually or singularly) are *A*'s; or one *B* (not determined individually) is an *A*. Therefore, such some, or such one, are, or is, *x*."

"Every *A* is *x*. But these or those (individually determined) *B*'s are *A*'s; or this or that (individually determined) *B* is an *A*. Therefore, these or those *B*'s, or this or that *B*, are, or is, *x*."

Where the syllogism is negative, the process of argumentation pursues the following course:—"No *A* is *x*. But every *B* is an *A*: that is to say, *all*, etc. Therefore, no *B* is *x*." "No *A* is *x*. But some *B*'s (of which, etc.) are *A*'s; or some *B*'s (of which, etc., but which, etc.) are *A*'s; or one *B* (not, etc.) is an *A*. Therefore, such some, or such one, are not, or is not, *x*."

"No *A* is *x*. But these or those (individually, etc.), *B*'s are *A*'s; or this or that (individually, etc.) *B* is an *A*.

Therefore, these or those *B*'s, or this or that *B*, are not, or is not, *x*."

It may be gathered from the foregoing exposition, that the conclusion of every syllogism lies implicitly in the premisses; or that what is asserted by that, is asserted implicitly by these. In the process, therefore, of syllogizing, there is not really an illation or inference. Inasmuch as the truth in the conclusion is parcel of the truth in the premisses, there is not a progression to a consequent really distinct from the antecedents. Really, (though not formally,) the process consists exclusively of two assertions: first, that a given something may be said truly of *every* of a given all; secondly, that every of the individual objects which form the subject of the minor, (or the single individual object which forms the subject of the minor,) is *one* of the given all.

It also may be gathered from the foregoing exposition, that the consequent or concluding proposition, *as being the consequent of the premisses*, follows from the premisses *by reason of their form*: that is to say, independently of any truth which the premisses themselves may contain, and even of any of the meanings which their subjects and predicates may import. Though each of the premisses asserts a falsity, or though its subject and predicate signify anything or nothing, the conclusion or consequent proposition, as being the consequent of the premisses, is deduced or deducible from these by a formal and necessary illation. "Conclusio a præmissis colligitur, per necessariam et formalem consequentiam, propter legitimam præmissarum in modo et figurâ dispositionem." That the conclusion follows from the premisses, independently of any of the meanings which their subjects and predicates may import, is shown by the foregoing examples; wherein *A*, *B*, and *x*, may signify anything or nothing.

That the conclusion follows from the premisses, independently of any truth which the premisses themselves may contain, is shown by the examples following. "Every ani-

mal is a stone. But every man is an animal. Therefore, every man is a stone." "No animal is sentient. But every stone is an animal. Therefore, no stone is sentient." Now in each of these syllogisms, the consequent proposition, as being the consequent of its premisses, is necessarily true; or, (speaking more accurately,) it follows from its premisses by a legitimate and necessary inference. In the former syllogism, however, the major premiss is false; and the conclusion inferred from the premisses, as *not* being such conclusion, is false also. In the latter syllogism, each of the premisses is false; whilst the conclusion inferred from the premisses, as *not* being such conclusion, is true; but since the premisses are false, the truth of the conclusion, as *not* being such conclusion, has no connection with its truth in its quality of a true consequent.

In short, the *rationale* of the process of syllogizing may be expressed by the folowing *formula*:—"A something may be said or predicated of *every* of a given all: Every of a number of individuals, or one single individual, is *one* of the given all: What may be said or predicated of *every* of the given all, may be said of the subsumed every, or of the subsumed one, which, according to the subsumption, is *one* of the given all." It is manifest from this *formula*, that the truth or falsity of either of the premisses, or the significance or insignificance of the subject or predicate of either, neither affect the consequence, nor the consequent, to which it leads. The validity of the consequence or inference depends exclusively upon two *data*: first, the unlimited universality of the affirmative or negative proposition which constitutes the major premiss; secondly, the assumption that the singulars or singular which form the subject of the minor, are, or is, of the singulars which form the subject of the major. These being granted, the consequent, as the consequent, follows by a necessary consequence.

* * * * * * * *

Various singular objects are connected by a common re-

semblance which shall be called z; and by reason of this common resemblance they constitute, or might constitute, a given *species* or *genus*. But of *every* of these various singulars, when considered singly and severally, and also without respect to the actual or possible class, a given something, which shall be called x, may be affirmed or denied. Now what may be affirmed or denied of *every* of these various singulars, when considered severally, may also be affirmed or denied of every of these various singulars if they be considered collectively and as forming or constituting the class.

Major premiss: Various singulars, including A and B, are connected by y. But A is, or is not, x, B is, or is not, x: And every other of the various singulars, as considered singly and severally, is, or is not, x.

Minor premiss: All these various objects, as considered jointly and collectively, constitute, or might constitute, the species or genus Z.

Conclusion: Every singular constituent of the actual or possible class is, or is not, y.

It is manifest that there is no illation. That what is true of every of the objects as considered singly and severally, is true of every of the same as considered jointly and collectively, and as being the constituent parts of an actual or possible class.

It is manifest that it follows by reason of the form. For let the major or minor be what it may, what is true of every when the objects are taken severally, must equally be true of every when the objects are taken collectively, and considered as bound together by a class or common name. Or that which is true of every unit of twelve when not considered as forming a dozen, is true of every of twelve considered as forming a dozen.

NOTES ON CODIFICATION.

It was not my intention to publish the following Notes on Codification, nor the Notes on Criminal Law by which they are succeeded. They are, as the reader will perceive, mere memoranda, and appeared to me too incomplete and fragmentary to be submitted to the public eye.

But the earnest representations of more qualified and more impartial judges, as to the substantial value of these hints, have induced me to lay aside my scruples.

I have been reminded also by members of his profession, that the publication of these Notes is now peculiarly called for; and that even these slight indications of Mr. Austin's opinions will be received with interest and respect by all who are labouring in the difficult field which he explored. Though nothing can be further from my thoughts than to seek in the circumstances of the times a factitious and transient popularity for anything written by him, I believe I have no right to withhold even these imperfect contributions to the advancement of the great work which he had so much at heart.

The original MS. consists of two sets or packets of Notes, one of which is written in pencil. The repetitions have been omitted, and the whole arranged under the heads marked by the Author. No other alteration in their form has been attempted.

Frequent reference is made to Lecture XXXIX., Vol. II., in which the subject of Codification is touched upon.

S. A.

NOTES ON CODIFICATION.



THE question of the expediency and practicability of Codification is double: general or abstract, and particular or concrete.

Considered in abstract, the question will not admit of a doubt. As a practical question, it is particular, and may admit of a doubt.

Objections however have been urged which apply to Codification generally. These I shall endeavour to answer, and shall afterwards advert to the particular objections to codification in England; the difficulties to be surmounted, and the course which, in my opinion, ought to be pursued.

All law is statute or judiciary. Consequently all codification (of existing law) is resolvable into two parts:

1°. A re-expression and arrangement of statute law:

2°. An extraction from cases of *rationes decidendi*, and the stating them as general rules and arranging them:

3°. A conflation of both.

[Sorts of law *in posse*, authoritative treatises, etc. must be codified also, if really having the effect of law. The characteristic differences of statute and judiciary law lie (as I have shown, in my Lectures,*) mainly in the form in which they are respectively expressed.

The interpretation of statute law and the peculiar process of abstraction and induction will be treated of hereafter.]

* See Lecture XXXVII., Vol. II. p. 321.

Admitting that codification is expedient as considered generally or in abstract, it follows not that it would be expedient here or there.

Dismissing the expediency of codification in particular with a brief indication of the considerations on which it turns, I shall confine myself to codification *generally*.

Order of treating the general question of Codification.

In considering codification in abstract, I shall consider,

First, its practicability:

Secondly, its expediency:

Thirdly, the objections (or the leading objections) which have been advanced against it.

The arguments to prove its practicability and its expediency, lie in a narrow compass; although, in my opinion, they are perfectly conclusive.

The demonstration of the nothingness of the objections occupies a considerable space.

The objections which I shall consider, go to codification generally; although the objectors commonly advance them with reference to codification here or there.

Practicability (and Advantages) of Codification (considered generally).

It is possible to extract from particular decisions, *rationes decidendi*; and leading principles and decisions. These, if stated in abstract (and exemplified) would be clearer than when lying in concrete: And would also be more general, abstract and adequate, being so expressed as to apply to all cases falling under them, and not limited to the cases (with their accidents) by which they were established.

The induction (previous to the application of the *ratio decidendi*), of a decided case, is Codification *pro tanto*.

The practicability of codifying the statute law will not admit of a doubt. If it be practicable to establish general rules (in an abstract form) one by one and without system, it is practicable to establish a system of such rules. The consolidation of the statute law is an admission of this *pro tanto;* and nothing can be more inconsistent than the objections raised to codification by the friends of consolidation. For they object to the former, the impossibility of viewing completely the field of law.

Practicability (with difficulty) of Codification.

Practicability of codification:

With reference to such part of the law to be codified as is statute;

To such as is judiciary.

Its difficulty.

Difficulty of rendering it complete; of rendering it consistent, and of duly subordinating the less general under the more general;

Of extracting definitions and principles from judiciary law.

Great evil done to the cause of codification by representing it as easy.

Expediency of Codification.

The expediency of codification follows from a notion of the Law; from a statement of the respective natures of statute and judiciary law; and from the bulk and uncognoscibility of unsystematized law.

It is better to have a law expressed in generals, systematic, compact and accessible, than one which lies dispersedly, buried in a heap of particulars, bulky, and inaccessible.

Its expediency is admitted practically by treatises, redactions, etc.; many of which are, in effect, codes: those who talk loudest against redactions, availing themselves of them

in practice. But redactions by private hands are not equivalent to codes.

The expediency of codification (in a particular case) must depend on a variety of considerations: especially on the quantity and degree of skill which it may be possible to bring to the enterprise.

The great difficulty is, the impossibility that any one man should perform the whole. But if done by several, it would be incoherent, unless all were imbued with the same principles, and all versed in the power of applying them. The great difficulty therefore is to get a sufficient number of competent men versed in common studies and modes of reasoning. This being given, codification is practicable and expedient.

Peculiarly technical and partial knowledge of English lawyers.

No English lawyer is master even of English law, and has therefore no notion of that inter-dependency of parts of a system on which successful codification must depend.

A code must be the work of many minds.* The project must be the work of one; and revised by a commission. The general outline, the work of one, might be filled up by divers.

All-importance in codification of the first intention. Till minds are trained, it will hardly succeed. How the difficulty is to be surmounted. Necessity for men versed in theory, and equally versed in practice;† or rather, of a

* "Männer, welche der Gesetzgebung, und insbesondere der allgemeinen, abstracten Gesetzgebung, gewachsen sind, gibt es sehr wenig, selbst im gelehrten Stande. Diess darf auch nicht befremden. . . . Denn eine gute Gesetzgebung ist das schwerste unter allen Geschäften; . . . die Kräfte vieler der Ersten müssen vereinigt werden, damit durch eine grosse Wechselwirkung etwas Gediegenes und Geründetes vollbracht werde."—*Thibaut.*—(*Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland.*)

† "Mit einem allgemeinen Gesetzbuch wären dagegen Theorie and Praxis in die unmittelbarste Verbindung gebracht, und die gelehrten academischen Juristen würden unter den Practikern ein Wort mitreden dürfen, während sie jetz überall mit ihrem gemeinen Recht in der Luft hangen."—*Thibaut, Noth., etc.*

combination of theorists and practitioners. Necessity for preliminary digests; or for waiting till successful jurists and jurisprudence are formed through effectual legal education.

Evil done to the cause by exaggerating the extent to which law may be made accessible to the laity.

How far, and how, law may be made knowable to the bulk of the community.*

If law were more cognoscible (in respect of its principles and ends) to the bulk of the public, the public would call more discriminately, as well as more decidedly, for legal reforms: would support good innovations and scout bad projects of ignorant quacks.

Effect of Codification on the character of the legal profession.

Law *may* be made accessible (in its whole extent) to lawyers.

Advantages that would thence ensue; by discharging law of mere rubbish, and simplifying it; and so leaving more leisure for the study of law itself and its rationale; and so inviting minds of a higher order into the profession:

By showing the subordination of detail to principles, and relations of parts to one another; and so rendering the rationale of law manifest, and law a rational and interesting study:

By making lawyers complete masters of the body of law, and so rendering good advice cheaper and more accessible; and making local judicature practicable.

Without local judicature, preliminary examination of parties, etc., good administration of justice is impossible.

But the possibility of local judicature, etc., depends in part on substantive law.

* Thibaut, Civil. Abhandl. p. 423.

With a local bar, there could not be the same division of labour as at present: therefore each man must be a complete lawyer; and that he may be, the bulk and complexity of law must decrease.

Floating jurisprudence must be reduced to the least possible quantity.

Such a reform in the law as is here contemplated would improve the character of the legal profession. Through improvement of their character, would lead to still further advances in legislation and, generally, in ethics.

Through the improvement of the legal profession, chicane would be less frequent. The morality of the bar and of attorneys would improve. From compactness, simplicity and cognoscibility, mistakes in conveyances, contracts, etc., and, generally, in extra-judicial conduct, would be less probable and frequent.

Codification of existing law, and innovation upon the substance of existing law, are perfectly distinct; although a code may happen to be wholly or partially new in matter as well as in form.

The codification now contemplated is merely a re-expression of existing law: the reduction of judiciary into statute, and the arrangement of both into apt divisions and subdivisions.

[This must, however, be understood with some limitations. In order to attain the simplicity which is the end of codification, it may be expedient to abrogate certain inconsiderable rights. *E.g.* In order to get rid of tenures, you must destroy the reverter to the mesne lord, making compensation.]

A code, as meaning a body of law expressed in general *formulæ* arranged systematically, and complete, is a modern idea.

The term "Code," as expressing such a body of law, and the term "Codification," as meaning the reduction of an existing body of law into such a code, are not expressive.

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*Expediency of beginning with a Digest.**

No harm done, though imperfect.

If arranged, as nearly as might be, according to the future code, it would be a preparative, and, if well done, a proof of practicability.

It would form a school.

The difficulty (perhaps an insurmountable one) would lie in the plan. The plan being formed by one, and revised and extended by a commission, unity in detail might be preserved by the superintendence of such commission,† as well as by the fact of separate authors working upon a common plan. Several plans might be presented to the commission.

It would less alarm the profession and give notice to them of an impending code.

Necessity of conciliating lawyers, and injustice of certain attacks upon them.

A Digest ought to be a conflation of statute and judiciary law, arranged in relation to subjects (and without relation to different systems of equity, etc.). This would rouse men's attention to the vast quantity of equivalent and passive rules, and would suggest the possibility of the conflation of Law, Equity, etc.

Whether Common Law and Equity, etc., ought to be kept distinct?

* It will be obvious to the reader that Mr. Austin employs this word in a totally different sense from that which it bears when applied to such works as Comyns' Digest, etc.

† Example of Suarez and the Prussian Code.

There might be two distinct Digests, one a statement of law according to subjects, the other of law according to jurisdiction. A Digest would serve as a guide to a future code; and to partial legislation in interim.

[Remark, that no reform considerably abridging the Law, could be effected without a minute and complete survey and statement of it.]

It would be a better index to existing law than at present exists; and a better institutional book. [The latter is indeed partly the purpose of Digests.]

A Digest cannot be supplied by separate and unauthorized hands; for no proportions would be observed in the parts, nor would the parts (not being constructed on a common plan) obviously, or even really, harmonize.

The length of such a Digest would be of no great moment: because abstracts and tabular views would serve as guides.

For the use of students, a systematic Digest ought to be accompanied by an historical one. An historico-dogmatical would not be convenient for reference.

In the historical Digest, the divisions would be the same as in the systematical, and Law on each head would be brought down to the system. It should not be a merely external, but an internal digest; an exposition of different doctrines.

For the use of students, Institutes ought to be compiled: being not merely abstracts of the Digests, but containing expositions of the principles of general jurisprudence, etc.

The historical Institute might in this respect be rendered extremely instructive:

e.g. By giving comparative views, historical and dogmatical, of English and Roman law.

A Digest should be, perhaps, composed in the manner of an analytic and demonstrative treatise: *i.e.* the rules

and principles should be extracted from the statutes and decisions; and that such are the rules and principles which the statutes and decisions establish, should be shown by examination and reasoning (where necessary).

This would lead to length; but that objection is answered already.

It would be the business of the general commission to abridge needless argumentation.

A mere extract of rules and principles (not in the words of the original authorities) would not inspire confidence: would be the proper form of a code intended to supersede existing law.

Mere extracts of generalities from authorities would be liable to the objections made above, as lying against Codes and Digests.

The general rules and principles should be carefully detached from the inductions, so as to show the law in general terms and prepare the way for a code.

Necessity for a standing Law Commission to supervise legislation, and work new laws into the Code;

To be aided by suggestions from judges and other practical lawyers: thus combining due deliberation and comprehensiveness with knowledge of actual exigences.

Also by suggestions from theorists.

The evils in the mode of making Statute Law mentioned by Park * are imaginary.

It is impossible to prevent the growth of judiciary law; but it may be kept within narrow limits.

The decisions of the Courts on the Code would not be more uncertain than other decisions.

* "Contre-Projet to the Humphreysian Code." By John James Park. 1828.

Immense superiority of judiciary law formed on a systematic whole, to law of the same kind formed on an undigested chaos. It would itself be no more than an interpretation of, and complement to, the code.

The projected code might be extended to Ireland, Scotland, etc.: codifying, in each instance, the particular or local law, which would be applicable in preference to the code. This was done in Prussia. Codification ought to be universal.

Objections to Codification considered generally.

Obj[n]. 1°. That a Code is necessarily incomplete; and cannot provide for all future cases.

Supposition that judiciary law provides for cases in *specie*, and therefore is not *finitum* (see Pandects, *ignorantia juris*) and knowable. Counter-supposition by Park.*

[Von Savigny's triangle is not a deduction of unknown from known, but a mere subsumption of individual under general, or of less, under more general.]

Answer.—Though it is not possible, by a Code (or any law) to provide for all future cases, a Code is less likely to be very defective than judiciary law; which is necessarily timid and inadequate.

And, at all events, *existing law*, by a Code, is given pure from particulars; whilst the comparatively small body of

* The passage alluded to by Mr. Austin appears to be this:—"In jedem Dreyeck giebt es gewisse Bestimmungen, aus deren Verbindung zugleich alle übrige mit Nothwendigkeit folgen: durch diese, z. B. durch zwei Seiten und den zwischenliegenden Winkel, ist das Dreyeck gegeben. Auf ähnlicher Weise hat jeder Theil unseres Rechts solche Stücke, wodurch die übrigen gegeben sind: wir können sie die leitenden Grundsätze nennen. Diese heraus zu fühlen, und von ihnen ausgehend den innern Zusammenhang und die Art der Verwandschaft alle juristischen Begriffe und Sätze zu erkennen, gehört eben zu den schwersten Aufgaben unsrer Wissenschaft; ja, es ist eigentlich dasjenige, was unsrer Arbeit den wissenschaftlichen Character giebt."—*Vom Beruf*, cap. iii. p. 22.

judiciary law formed upon it is formed on a compact and perspicuous whole, and may easily be wrought into it.

2°. That every case is decided by the joint application of several rules.

Answer.—But this applies to judiciary, as to all law; no judicial decision being applicable to a concrete case. As put by Portalis, the objection shows that law is impossible. And in the case of well-made statute law, the rule is given: nothing but the labour of applying it remaining.

3°. That a Code is unalterable (or, at least, less malleable than a body of law formed by aggregation). Hence, a Code, if made in an incompetent age, saddles a more competent posterity with its own vices. And, hence, codified law does not adapt itself to the successive wants of successive ages so easily as law made bit-wise: it will perpetuate the defective ideas of that age, and retard the progress of society.

Answer.—The reverse is the truth, on account of the natural tendency of judicial legislators to legislate by analogy; and so to perpetuate the ideas of past ages, so far as is consistent with inevitable change.

4°.—Superior malleability of Common Law.

Answer.—This supposes, if true, uncertainty, from perpetual alteration. Park makes the same objection to judiciary law. It is not inherent in any law.

The historical School of Jurisprudence, so far as they are right, concur with everybody. Their peculiar views of the value of history, exclusive of philosophy, are wrong.*

[Government and Law as they ought to be in advanced societies, are not to be learned from the imperfect Institutions of barbarians. The circumstances in which they were placed were different from our own; their ability to form a judgment upon the institutions best adapted to their own circumstances, were not so great as our own.

* See Note, p. 297.

But although Legislation must be bottomed in general principles drawn from an accurate observation of human nature, and not in the imperfect records called history, there are cases in which historical knowledge has its uses. *i. e.:* To explain the origin of laws, which are venerated for their antiquity.* To explain much of the law, which now exists; and to enable us to separate the reason of modern times from the dross of antiquity.

All systems of law have a common foundation in the common nature of mankind; but the principles which pervade them all, are fashioned and obscured in each by its individual peculiarities.

The good sense of legislators and judges in modern times is always obscured by, and often forced to bend to, the nonsense of their predecessors.† To understand Mansfield we must study Coke: Justinian is not to be understood without a knowledge of the rude institutes of the earlier Romans.]

Law (as it ought to be) is not deducible from principles knowable *à priori*, but from principles which must be obtained (through induction) from experience. No experience of actual institutions, independently of the principles which are obtained by experience of Human Nature, can be of any value.

5°. A Code is more liable to engender competitions of opposite analogies, than a body of law consisting of judiciary rules, or of judiciary rules patched with occasional statutes.

Answer.—But, as has been shown,‡ the competition (incident to the application of law) is merely a consequence of the inconsistency of rules: an inconsistency arising commonly from their indefiniteness.

The argument, therefore is no substantive objection to codification, but is merely another argument, (namely, that a code is necessarily less definite than a body of judiciary rules) put in another form.

The very question, or at least the main question, between

* See Bentham, 'Defence of Usury.'

† Thibaut, *Versuche, Nothwendigkeit,* etc.

‡ See Vol. II. p. 340.

the advocates and enemies of codes, is this: whether a code or a body of uncodified law be essentially most productive of a competition of opposite analogies: *i. e.* be essentially least definite, and generally least coherent.

[Explain what is meant by "competition of opposite analogies." See Vol. II. p. 336.]

6°. Tendency of codification to disturb rights and duties created by codified (and anterior) law.

7°. That no determinate leading principles will be followed consistently by makers of the Code, and the provisions of the Code will therefore be defective and incoherent.

Answer.—This is only true of incompetent makers.

Objectors to Codes sometimes suppose that a Code must consist of insulated and incoherent propositions. *E contra*, one of its chief merits would be an exhibition of dependencies.

If formed by induction and extraction from an existing system of law, it would possess the internal organic consistency attributed to law growing by aggregation; and would render that consistency more visible, by detaching the rules from the concrete matter, and arranging them systematically.

8°. That private expositions of the law by competent hands serve all the purposes which codifiers aim at:

That in an age having such hands, and therefore alone capable of successful codification, codification is therefore needless:

That, accordingly, no demand was made for a Code during the time of the classical jurists.

9°. That a code will not be fitted to the customs, prejudices, wants, etc., of the community; nor to experience:

It will not, like judiciary law, be a mere expression of anterior custom.

Answer.—This, besides being false, is applicable to all law, save judiciary, and statute law founded on custom.

10°. That the defects of a Code being more obvious than those of uncodified law, a Code would give greater opportunities for chicane.

For answer, see Lecture XXXVII.*

Further answer: The argument is suicidal; for, if defects are more obvious, a Code must be more simple, compact and intelligible than an uncodified system.

Defects therefore were more curable, and also more evitable till cured.

11°. If the Code could be constructed with ease, it would be contemptible:

Difficulty is good, because the labour of surmounting it is laudable.

Answer.—Unhappily, an easy, and therefore little-worthy-of-praise, Code is not practicable.

12°. Its effect in annulling and disturbing existing rights and duties.

Answer.—This has little application to a codification of existing rules.

It has, however, some: because the forms of existing rules would be modified (or the Code would be of no use), and the equivalence of rules in a new guise to rules in the old, might often be doubtful.

Old rules would remain in force with regard to rights and duties which had grown up under them.

13°. A Code (in order to approach to completeness) must consist of rules so minute and numerous that no man could learn or retain them:

Impossibility of providing completely for future particular cases:

Bulk and complexity which would result from the attempt to provide for them.

Answer.—Codification ought not to be a specification of cases, but a series of rules applicable to cases.

14°. Objection by Park, from the alleged infinitude of rules.

Answer.—If this were true, law would be impossible.

* Vol. II. p. 321.

Perhaps he means that the future exigencies requiring new laws, and consequently the new law required, are infinite.

But who ever imagined the possibility of constructing a code which should provide completely for all future times?

But it were more possible to provide for future cases by a code than by judiciary law. Prætorian law is praised by the Digests for this very reason. Inconsistency of Hugo and others in this respect.*

By Park the objection is thus answered:—

"Supposing that which is impossible, viz. that all lawyers in this country were *equally* learned, there would be little or no litigation, compared with the immense multiplicity of transactions; because almost every point is so far settled or influenced by decision, that in ninety-nine cases in a hundred they would all be of one mind."—*Park, Contre-Projet*, p. 195

According to this, existing law *has* nearly provided for all possible cases; and whatever of uncertainty exists, arises, not from the incompleteness of the law, but from ignorance by lawyers of its provisions.

Consequently, a reduction of this law to a compact, systematic, and more accessible form, would remove the present ground of uncertainty, by rendering the law more generally known by lawyers.

But, in truth, his assertion is false, and contradicted by himself elsewhere.†

A Code or systematic exposition (if well made) would possess all the advantages pointed out by Von Savigny,‡ and would therefore tend to make lawyers better lawyers than now.

It would show the subordination of the detail to the leading principles, and the relations of these principles and

* Merits and Defects of Statute and Judiciary Law. See Lecture XXXVIII., Vol. II.

† See pp. 50, 208, 212, 228.

‡ Vom Beruf, cap. 6. p. 48.

detail to one another:* would render the *rationale* manifest, and positive law interesting.

In a code or statute (if well made) the law is given. In judiciary law, not.

The difficulty of applying the same, whether law is statute or judiciary.

A case often (or always) consists of various parts, and cannot be decided by any one single rule.

But this is just as applicable, whether law be statute or judiciary.

The objection seems to suppose (contrary to the objector's own assumptions) that precedents are exactly in point, instead of merely furnishing rules.

The difficulty really consists in determining the rule (if any) within which a given case falls, or whether it falls or not within a given rule; and in conceiving distinctly the case, the law, and the relation of the case to the law.

But this proves merely that lawyers should know the law, should be capable of clear apprehension, and be good logicians.

Assuming a code well made, their knowledge of the law would be more perfect. The Law would then be (as it was to the Roman lawyers and Lord Coke) completely present to their minds, and suggested by a particular case.

Objections derived from the defects, errors, and alleged ill-success of actual Codes.

Admitting the defects, errors, and (to some extent) ill-success of such Codes:

Such defects, errors, and ill-success prove nothing against codification generally; or against codification in any particular country (including countries in which the codes in question were compiled and have obtained as law); unless

* Thibaut, Versuche, vol. i. p. 175. See also, Thibaut, Nothwendigkeit, etc., pp. 425 to 431.

such defects and errors, with the other causes of the ill-success, were necessary, and not accidental and avoidable.

Accidental and avoidable causes have rendered the French and Prussian codes unsuccessful to a considerable extent; though, after all, the failure of these codes has been much exaggerated.

Brief review of Justinian's Compilations, and of the French and Prussian Codes, for the purpose of showing that the defects, errors, and ill-success of those particular compilations was owing to causes not necessary.

Justinian's Compilations.

In Justinian's Codex, statutes and decrees are mixed up; nay, *privilegia* are mixed up and confounded with rules and principles, made for general application.*

The compilers had some notion of the necessity of defining terms and principles in order to cut off all reference to anterior law.

As a further means of attaining this end, they left in much historical matter.

The Code and Pandects form properly the intended body of law; a body intended to be *complete*.

The Institutes, (a book for the use of students, though also law,) were derogating from the Code and Pandects, or supplemental to them.

The Novels are mere correctives of previous compilations.

Much of the Code and Pandects consists of judiciary law; and of judiciary law detached from particulars necessary to make them intelligible.

These compilations (therefore) are not a Code, *sensu ho-*

* Thibaut, Auslegung; Spangenberg, Einleitung in das Römisch-Justinianeische Gesetzbuch. Mackeldey, Lehrbuch des heutigen Römischen Rechts. (On the Order of the Code and Pandects.)

dierno. They are a body or heap (without scientific arrangement) of statute and judiciary law; the latter, so given that it must be gathered by guess from mangled documents.

It is remarkable that the compilers felt the necessity of definitions and expositions, omitted by the French redactors.

Their (imperfect) contrivances to render a resort to the old law needless.

French Code.

The French Code contains no definitions of technical terms (even the most leading); no exposition of the *rationale* of distinctions (even the most leading); no exposition of the broad principles and rules to which the narrower provisions expressed in the code are subordinate.

Hence its fallacious brevity.

Brevity is of no importance except as it tends to perspicuity and accessibility.

In consequence of the want of such definitions, etc. (and of purposed incompleteness hereinafter mentioned), old law (or a body of jurisprudence formed upon old law) has been appended to the code.

[Such definitions are practicable (or no law is possible), though difficult; as I have endeavoured to show in Lecture XXXIX., Vol. II. The imperative part of every law containing but a small portion of it, definitions and expositions are absolutely necessary.]

Inattention to a due settling of those all-pervading principles and main partitions or distinctions, upon a precise conception of which, consistency in execution of detail depends.

Success in codification (as I shall observe hereafter) must mainly depend on first intention: on aptness of plan.

Haste with which the *Projet* was compiled. Faults arising from ignorance and haste could not be corrected by the Council of State, who were more ignorant still; and who

merely examined, bit by bit, articles of the *projet*, instead of examining the *projet* as a whole.

Original conception as to matter and arrangement, defective: a defect not to be cured by discussions on the plan conceived.

Ignorance and incapacity of the compilers; Ignorance of, combined with servile respect for, Roman law;—the main basis of the code. They knew little besides the Institutes, and have therefore blindly followed them, with all their *lacunæ*. They were ignorant of the most fundamental distinctions (*e. g. dominium* and *obligatio*). This last is a proof of their carelessness, as well as incapacity. No care has been had to amend the code, or to work in subsequent decisions and statutes.

Separation of the *Code de Commerce* from the *Code Civil*, and general misapprehension of the nature of the distinction between *jus personarum et rerum*.

It was not the purpose of the compilers to form a complete Code.

Bad as is the French Code, slight alterations in the text would supersede the interpretative decisions.

Structure of the Prussian Code.

It is not loaded with precedents, but with declaratory laws, provoked by particular cases. Such laws differ from the judicial decisions of the Court of Cassation.

Consequent necessity for letting in the old *Gemeines Recht* to explain it.

No care has been had to work the Novels into the code.

The Prussian Code was not intended to be a complete body of law, but merely a digest of the common and subsidiary law where local law obtained.

The *præjudicia* are of no authority.

There are no adequate definitions or expositions of leading terms and principles.

Subsequent legislation is not wrought into the code.

The applicable *Gemeines Recht* consisted for the most part of Roman and Canon law.

Notwithstanding these acknowledged defects, all practical men in Germany are codifiers.

Reasons for the hostility of a portion of the professors in the Universities.*

Conclusions from the Review of Codes.

First; That their defects, errors, and partial ill-success were not the results of necessary causes.

Second; That, in spite of such errors, etc., those codes are better than the body of law that they superseded.

Conclusions as to Von Savigny's Arguments founded on such defects, etc.

Great respect is due to the opinions of Herr von Savigny, which no man feels more strongly than myself.

All the objections which I have noted and answered above, are advanced by him.

His book is directed against codification in a particular country, and even against a particular scheme of codifica-

* "Am wenigsten lasse man sich aber dadurch irre machen, dass die gänzliche Umänderung unsers bürgerlichen Rechts unter den eigentlich gelehrten Rechtskennern vielleicht die mehrsten Widersacher findet. Das wird stets so bleiben; und jetzt ist es gar nicht anders zu erwarten: . . . für kräftige Umwälzungen wird die Mehrzahl der eleganten Juristen nie gestimmt seyn. Keiner von ihnen übersieht in der Regel das ganze Recht; wenigen von ihnen werden die Bedürfnisse des Volks durch Beobachtung klar; und die mächtige Triebfeder des Eigennutzes wird keinen in Bewegung setzen; vielmehr wird es immer vortheilhafter für sie seyn, die mühsam errungenen critisch-historischen Schätze in gehöriger Sicherheit zu halten, und gegen bessernde Einrichtigungen zu kämpfen, damit ihnen nicht die Pflicht werde, den neuen Menschen anzuziehen."—*Thibaut, Nothwendigkeit*, etc.

tion for that particular country; but, nevertheless, many or most of his arguments apply to codification generally.

The objections peculiar to him are these:—

1. That in an age capable of producing a good code, a code were needless: the want being supplied by private expositors.

2. He asserts that during the ages of the classical jurists (who, he admits, were competent to the task), no want of a code was felt.

3. That a code makes the defects of law more obvious, and therefore emboldens knaves.

4. That if a code were easily to be constructed it would be good for nothing.

To this I answer, that codes have no tendency to simplify the science of jurisprudence or to abridge the studies of lawyers. They have a tendency to discharge it of rubbish.

The study of cases (as exemplars for the difficult art of applying rules) would still be necessary to lawyers, though a code were introduced.

He assumes that no determinate leading principles will be followed consistently by the compilers of a code.

He is not however opposed absolutely to all codification.

He is an advocate for a code which should include all but future cases; and he has proposed a digest. He has himself suggested an important argument to show that the main difficulty in the way of codification is not insurmountable. But he would wait (for improvement) till better jurisprudence and jurists are formed.

His proposal of a digest is inconsistent with his main reason to show the inexpediency of codification in Germany.

His opposition to Codes is the effect of *gelehrter* prejudice in favour of Roman law, and of national antipathy.

Nullity of his Treatise as an argument against codification generally, and even as an argument against it in Germany, the proper and special object of his attack.

Note.—As the great controversy on the expediency of constructing a Code of Laws for the whole of Germany is frequently alluded to in the foregoing notes, and constant reference made to the works of the two great leaders of the conflicting parties, it may not be superfluous to say a few words concerning them.

After the deliverance of the country from the French yoke, the minds of patriotic Germans were anxiously employed in inquiries into the causes of the feeble and divided resistance made by their country, and in projects for strengthening the bonds which might unite the several States into a well-compacted whole.

Among them, was that of which Thibaut was the ardent and eloquent advocate. In his Essay "On the Necessity of a general municipal (or national)* Law for Germany," he treats the construction of such a body of law, "clear, precise, and adapted to the requirements of the time,"—as one of the first conditions of a strong and efficient Confederation.

Thibaut was a Hanoverian by birth, and had studied at Göttingen, Königsberg, and Kiel, at which latter place he took his degree, and was appointed professor. In 1802 he had a call to Jena, and in 1805 he was invited to assist in the reorganization of the University of Heidelberg.

Thibaut's works are numerous and of high authority.† His style is homely and familiar, but has great force and animation. He proposed that a Collegium or Commission should be nominated by the several States, and he maintained that by the cooperation of the ablest theoretical jurists (Professors in the different Universities), with practising lawyers, such a Code of

* The word in the original is "bürgerliches"—civil; but civil, as applied to Law, has a totally different meaning with us.

† The principal are, 'Theorie der logischen Auslegung,' 'Kritik der Feuerbach'schen Revision der Grundbegriffe des Strafrechts,' 'Civilistische Abhandlungen' (of which Essays the 'Nothwendigkeit,' etc., so often referred to, is one), and the 'System des Pandecten Rechts,' which is regarded as his capital work.

Laws as above described, applicable to all Germany, might be constructed.

The most illustrious opponent of this scheme was Von Savigny, the leader of the so-called Historical School (founded by Hugo and Schlosser); whose great learning and acuteness, combined with a consummate talent for exposition, rendered him a formidable antagonist.

In his youth he had the rare advantage of being able to travel throughout Germany, France, and Italy, in search of unknown or neglected sources of Roman Law, and returned laden with spoils to Marburg, where he had studied, and was now appointed Professor. In 1803, he wrote his Treatise on the Law of Possession.* On the creation of the University of Berlin in 1810, Savigny was one of the first teachers appointed. His lectures, especially those on the Institutes, together with the history of the Roman Law and the Pandects, drew crowded audiences, not only by the copiousness and importance of the matter, but by the extraordinary clearness and beauty of the form.

His celebrated work, "On the Vocation of our Age for Legislation," is known to the English public through Mr. Hayward's translation.

The discussion on the expediency of Codification was carried on with great asperity: its partisans complained that they were unfairly represented by the leaders of the Historical School, as advocating the introduction (or rather the imposition) of an entirely new body of Laws (which they never contemplated); while their adversaries disclaimed the opinion imputed to them, —that Law should have no other source than a historical one.

In one of the Essays contained in the Volume which has been frequently quoted, "On the Influence of Philosophy on the Exposition of Positive Law," Thibaut concludes with the following discriminating and impartial statement of the claims of the contending parties.†

"Nothing is more to be wished than that the philosophical and the elegant‡ jurists should soon cease to regard themselves as

* 'Das Recht des Besitzes.' Of this book Mr. Austin always spoke with enthusiastic admiration. It has been translated by Sir Erskine Perry.

† 'Einfluss der Philosophie auf der Auslegung der positiven Gesetze.' Translated by Mr. Lindley.

‡ See, for the use of the term "elegantia juris," Vol. II. p. 231.

two hostile parties. Each side must abate somewhat of its pretensions, and reciprocally take what is good from the other. Without philosophy there is no complete history; without history, no safe application of philosophy. Both must unite as aids to Interpretation, and must exercise a continual influence on each other. The jurist who aspires after perfection will therefore endeavour to combine profound historical knowledge with philosophical views; for the historical part of Jurisprudence can never be separated by a sharp line from the philosophical. In each are gaps, which can only be filled by the aid of the other."

S. A.

NOTES ON CRIMINAL LAW.

INCONVENIENCES OF THE PRESENT STATE OF THE CRIMINAL LAW.

Inconveniences of the Present Common Law.

Insufficiency, bulk, dispersedness, and general uncertainty of the authorities from which the Law must be gathered.

1°. As to Reports:

2°. As to Records:

3°. As to the Treatises which are commonly deemed more or less authoritative.

These various authorities are extremely numerous, and also lie dispersed; insomuch, that no lawyer has a complete collection of reports and treatises.

Much of the law contained in these reports and treatises has been repealed by statute or overruled by decisions. Great research is therefore requisite to distinguish living from dead law.

Hence, uncertainty.

Generally, there is no mark or test by which authoritative decisions and authoritative opinions of text-writers can be sufficiently distinguished from the unauthoritative.

Uncertainty arising from the higher or lower authority of the judge or writer; nature of the report; circumstances under which the treatise was published; etc.

Remarkable,—that, in practice, the decisions of Quarter Sessions are not authoritative.

Same as to Irish Decisions.

Yet, in theory, these decisions (Quarter Sessions and Irish) *are* authority; and, consequently, decisions of the kind, conflicting with decisions resorted to practically, might be hunted out and produced.

Although the authorities from which the law must be gathered, were not bulky, dispersed, insufficient, and uncertain, still the law itself would be obscure and difficult of access, by reason of its being latent in judicial decisions [and opinions analogous to them].

Difficulty of extracting principles from decided cases: especially where the grounds of decision are not sufficiently apparent from Report and Record.

Owing to this difficulty, principles are applied by judges timidly and capriciously.

It often happens, that a principle is not applied to a case clearly within it, because the decided cases establishing the principle do not tally with the pending case in immaterial facts and circumstances.

Hence, doubts thrown upon the principles themselves.

Immaterial facts are not unfrequently rendered part of the ground of decision. Decided cases are not treated as mere *indices* to the principles. (Qe.)

Difference between the construction and application of Statute Law, and the extraction and application of rules of law latent in judicial decisions. (Qe.)

Criminal Statutes are construed strictly. Hence the discrepance between statute and common law is more striking in criminal law.

The shape of a statute differs essentially from that of a judiciary rule.

As a *whole*, a judicial decision is not a precedent, or has not the effect of a law.

Difference between Interpretation and Induction.

Judiciary law lies *in concreto*. Difficulty of extracting it. Nicety and uncertainty of the process.

The *ratio decidendi* is often conceived and expressed by the judge too narrowly or too broadly. Hence the law, *as expressed*, (for the *ratio* itself ought to be deemed the law, independently of the expression of it,) is often too narrow, (immaterial circumstances being expressed as part of the reason,) and sometimes too broad.

Much of present law is founded on antiquated notions:

E.g. With regard to the *subjects* of theft. Looking at the offence as conceived at present, there is no reason why things which are parcel of the soil should not be deemed subjects of the offence (if capable of a clandestine removal).

[Maraudage. Prussian Code.]

The same remark applies to the rule as to domestic animals; as to choses in action; and as to value of subject; as to goods of which there is no apparent owner or party entitled to possession; and to the absurd reason given for absolving the wife from criminal liability.

Obscurity arising from partial adherence to, and partial departure from, these antiquated notions. Hence, Law, not a law founded on uniform principles, but a patchwork of laws formed on inconsistent principles:

E.g. Common Law rule as to *choses in action* only partially abrogated by statutes (and decisions).

Rule about *value* exchangeable (or intrinsic), still retained as to certain animals. Generally overruled, but yet retained capriciously in certain cases.

Partial and capricious extension of the definition of Larceny to cases of swindling and embezzlement. Larceny, if the thing be let out to hire and stolen by the hirer. Not Larceny, if the property, as well as the possession, be parted with.

Partial conversions of takings of things affixed to freehold into thefts, by statutes.

Hence, not only inconsistency and consequent obscurity, but needless multiplication of rules. A principle, admitted to be irrational, is maintained with exceptions, instead of substituting one uniform rule.

In so far as law is judiciary, this partial abandonment and partial retention of antiquated notions is natural or nearly necessary. From the position wherein he is, the judicial legislator naturally legislates by analogy to the old law, in so far as the preservation of the old law is consistent

with inevitable change. And hence, antiquated principles are perpetuated in laws after the grounds for them have ceased.

Circuitous and obscuring modes by which rules founded on antiquated notions have been often abrogated, wholly or partially.

By distinctions founded on immaterial differences:

E. g. The interval between taking and severance makes taking of an immoveable, theft.

Obscurity arising from the frequent extension of definitions (through fictitious assumptions) to cases which are not properly within them, but are only related to cases within them by close or remote analogies:

E. g. Swindlings, breaches of trust, and other offences not properly thefts, are brought within the category of thefts by the fiction of a constructive possession.

Legislation by Extension of Old Rules to Cases not within them.

According to the original and rational notion of theft, a taking possession, *without* the consent of the injured party, (from the possession of the injured party,) knowing, etc., and with intent to deprive, is of its essence.

But it is extended to cases in which the injurer obtains possession *with* consent of the injured, but with consent obtained by fraud.

In order to bring this last offence (properly swindling, or *filouterie*) within the definition of theft, a possession is feigned in the injured party, although he has parted with it.

It is also extended to cases in which the injured party has given up possession with consent not obtained by fraud.

Also, to cases of finding and misappropriation.

Also, to cases of embezzlement, where there is no delivery by the injured party.

Inconsistency, as well as obscurity, arising from the cause

in question. Since, if the definition ought to be extended by reason of some analogies, it ought to be extended by reason of others. Insomuch, that any offence of any class might be thrust with propriety into any other class: since all offences are related by analogies more or less remote.

It ought to be remarked, in justice to the authors of the English Law, that this inconvenience is almost inseparable from a law formed gradually by Courts of Justice, etc.

The same obscurity, from the same cause in the Roman Law. [Pandects, Book xlviii., *passim.*]

Has not been avoided by the compilers of the French and Prussian Codes; though they, as formers of a system created at once, had none of the difficulties with which the English Courts of Justice were embarrassed. (*Q*.)

Origin of fictions. Necessity of observing analogy.*

Definitions and rules (owing to preceding and other causes) are not unfrequently conflicting, or, at least, indeterminate:

E.g. Several and inconsistent definitions of theft or larceny:

Uncertainty as to what shall amount to special ownership.

Uncertainty as to the nature of the *intention* which is of the essence of theft. The word *felonious* (like unlawful or criminal) does not define it, but merely indicates that it is of the essence of the offence:

Nature of the criminal intention (or knowledge) which is of the essence of theft.

[Felonious—*Animus furandi. Malitia.*]

Materiality or immateriality of *lucri causâ.*

What motive is a *lucri causâ.*

Indifference of motive. Larceny is the taking without consent, knowing, etc. And unless this definition be abided by, this offence cannot be distinguished from various other offences: as malicious damage, embezzlement, etc.

Indifference of motive, shown by rule as to exchange, etc.

* See Lecture XXXVIII., Vol. II.

Uncertainty of this rule.

Theft or Larceny is properly an offence against right of possession. If not, an owner could not steal his own goods.

Consequently, any right of possession as against the taker ought to suffice; yet, there are doubts as to whether such right of possession resides in certain custodees, etc. [or whether, in the language of the law, they can be deemed special owners.]

No right of possession in owner (as against thief) where the goods are hired; though there is when they are bartered.

Inconsistency of holding taking goods not to be an offence, where the purpose is merely to apply them to some temporary purpose.

Same confusion of inducement and criminal intention as noted above in case of *lucri causâ*.

Uncertainty of rule as to finding and misappropriation.

Inconsistency of holding bailee generally not answerable criminally, and yet custodee answerable; and of holding bailee answerable where bailment is determined.

Principles obscured by being often couched in Latin terms not generally understood, and not unfrequently misapplied: *E.g. Lucri causâ. Larceny,* instead of the familiar and more precise *theft.*

Larceny, or *latrocinium,* not theft.

INCONVENIENCES OF THE PRESENT STATUTE LAW.

The Statute Law is not of itself a substantive and intelligible whole, but a mass of partial supplements, and partial correctives, made, *pro re natâ,* to the Common Law. (The latter, the *nucleus.*)

Hence, often inconsistent. It lies dispersedly through many statutes and decisions upon them.

Hence, bulk, inaccessibility, etc.

And, generally, it is productive of most of the inconveniences before pointed out in the Common Law.

Wherever the *basis* or *nucleus* of statute law is a judiciary law, the former is irregular, fragmentitious, etc.

INCONVENIENCES FROM THE EXISTENCE OF TWO DISTINCT BODIES OF LAW; ONE COMMON AND THE OTHER STATUTE.

As the Law actually stands, the law relating to any given offence commonly or frequently lies through many dispersed statutes and many dispersed reports or treatises.

Supposing that the Common and Statute Law were each systematized separately, the law relating to any given offence would often lie in two bodies of law; instead of lying in one department of one body of law.

By the incorporation of the two Statutes, great benefit will result, for the following reasons.

The present statute law consists partly of definitions of offences, with their punishments; and partly of the punishments of offences, leaving the definition of them to the common law: and it were expedient either that it should not be necessary to look after the definition of an offence in one statute, and its punishment in another; or that this should prevail in every case, and not in one only. The like observations apply to process.

The two statutes when separate must be often obscure and prolix, where the union of the two would tend to brevity and intelligibility.

The advantage would be gained of treating the *generalia* (of law or procedure) apart from those portions of the special part to which they are applicable indifferently: *E.g.* Misapprehension of right; accident; mistake; felonious intent; principals and accessories.

Many of these *generalia* (in existing treatises) are either omitted, or are stated under some head devoted to some particular class of offences (thus wearing the appearance of particular provisions). *E.g.* Malice, Negligence.

The advantages which would ensue from such an arrange-

ment cannot be shown fully without a scheme. Such scheme, pursued considerably into detail and backed by reasons, ought to precede the process of consolidating and combining.

As remarked above, Codification, and Innovation on substance or effect, are distinct. The codification here recommended would not necessarily touch substance or effect; but would be no more (necessarily) than a re-expression of definitions, and an arrangement of offences under apt kinds and sorts, etc. But though the refount of form, now recommended, would not touch necessarily the substance or effect, still it might not perhaps be possible to render it altogether so good as desirable without small changes in substance. *E.g.* Reduction of rule in larceny as to right of possession.

Advantages of combining Common and Statute Law into one Statute or Code.

One source substituted for two.

Rules stated once for all, instead of being stated partly in one statute and partly in another.

Hence, more compendious.

If common law were reduced into one statute, and statute law consolidated in another, they might often conflict. If combined, no such conflict.

If common and statute law were to be united into one statute, a refount of the present form of the law would be expedient.

Necessity of considering every part in relation to the rest, and not as detached.

Also, of defining broad principles, subordinating narrow principles under them, and elucidating by examples. The actual law is a rich mine of such examples; and indeed, generally, is more objectionable in respect of its form than in respect of its substance and effect.

If the two statutes were incorporated or even if they were

kept separate, it would be expedient to diminish their size, and at the same time to render their contents more accessible, by *reducing under one head* such matters as are constantly recurring and are separated under different heads.

E.g. Principal and accessory: attempts to commit offences, etc. etc.

If the two statutes were incorporated, or even if they were kept distinct, it would be necessary to settle with great attention the *arrangement* according to which existing statutes and existing common law upon particular subjects should be put together.

E.g. Whether, in the general statute of statute law, larceny should come next to forgery, or not? Whether jury process and bail should be near each other? What the statute should begin with, what end with?

Inconveniences of the Present Law, in respect to the Administration of Justice.

In respect to the administration of justice by the judges on circuits, etc.

Owing to causes mentioned in preceding paragraphs, rules and principles are applied timidly and capriciously.

In fact, judges, as well as advocates, are guided by modern and unauthoritative treatises.

Opinions of judges on doubtful points gotten slowly.

In respect to the Administration of Justice by Justices of the Peace.

As they are not generally professional lawyers, they need compendious and perspicuous rules. [Importance of proceedings prior to commitment.]

They are necessarily incompetent to the delicate task of extracting principles from decided cases.

Difficulties which they experience from the multitude and dispersedness of statutory provisions; from the language and form of statutes; from the obscurity of rules of construction, etc.

Though they were competent to the administration of the law, they have not access to the most of statutes and authorities through which it lies.

In fact, therefore, they are guided by modern and unauthoritative treatises.

Vast extent of their jurisdiction.

Tendency of the present age to administration of justice by local or district courts.

Impossible that the administration of justice by such courts should be passable, unless the law be rendered more compendious and clear than it is at present.

Inconveniences of the Present Law, in respect to Legislation.

Owing to the bulk and dispersedness of statutes and authorities, innovations on existing law are seldom guided at present by an adequate consideration of the entire legal system. Hence, for the sake of obviating some particular evil, greater evil is often done.

For the same reason, there is much needless legislation. For it often happens that the object of the change is sufficiently accomplished by actual law unknown to the legislature: or might be accomplished sufficiently by some slight alteration of the actual law.

Inconveniences of the Present Law, in respect, generally, to the Community who are bound by it.

If the foregoing difficulties are experienced by the Courts and Legislature, *à fortiori*, by the community at large.

In fact, not one in a thousand knows the laws which bind him.

If such are the difficulties in the way of lawyers, etc., the same are insurmountable to private persons.

Accordingly, scarce any but professional lawyers have any knowledge of the criminal law, although of necessity they must be bound by it.

PRACTICABILITY OF REDUCING COMMON LAW INTO STATUTE LAW, AND OF CONSOLIDATING STATUTE LAW.

If it be possible to extract principles *pro re natâ*, it is possible to extract them once for all, and to put them in the form of rules.

The difficulty of the process is not disputed.

The practicability of consolidating statute law is admitted in practice. Indeed, it is little more than an affair of arrangement.

ADVANTAGES THAT WOULD FOLLOW SUCH REDUCTION AND CONSOLIDATION.

Advantage of having the law relating to any given offence collected under one or two heads, from numerous sources, through which it now lies dispersed:

Of having it in a cheap (as well as a compendious) volume:

Of separating living from dead law.

Indeed, a mere republication of actual sources (assigning respective weights). marking the law abolished, would be of itself no inconsiderable good.

No desire to exaggerate the extent to which Law may be made generally intelligible. But criminal law, for the most part, might be made intelligible to any man of average capacity. And this is the most important advantage.

It does not enter, generally, into the detail of rights:

(*E. g.* Larceny; which is properly an offence against the right of possession.)

Possibility of defining in criminal law the rights and duties of which crimes are violations, in so far as criminal law is concerned with them, without going into any such detail:

E. g. Without going into any detail of rights of property, an adequate definition of the right of possession as affected by theft, (which is properly an offence against the right of possession,) malicious mischief, etc., might perhaps be given.

Advantages of its being made perfectly intelligible to lawyers, which it might be.

As being more accessible, it would be more obvious to the legislature; and therefore much crude and inconsistent legislation would be avoided.

Advantages that have arisen from Peel's Consolidations.

SUCH REDUCTION AND CONSOLIDATION WOULD, AT LEAST, BE HARMLESS.

Doubts would arise on application of law thus reduced and consolidated: But probably fewer than on application of the present law.

Pre-existing law would furnish ample means of construction, and interpretative decisions might, from time to time, be incorporated with text.

[Rules of construction to be framed, and to be considered as peculiarly applicable to the Criminal Code.]

By submitting the Statute or Statutes to the public or the profession before they were passed into a law, many of the causes of doubts might be obviated.

Such reduction, etc., would not amount to a change in the substance and effect of the existing law, but would simply be a re-statement of the existing law, in an orderly, compendious and accessible volume; with the determination of points confessedly uncertain.

It would not, necessarily, have any retroactive effect.

In fact, it would be a substitution of an authoritative body of law for the unauthoritative (and often defective) treatises, which (as we have already remarked) are practically the guides of the tribunals in the great majority of their decisions.

Imperfections of these.

Though never so perfect, they are unauthoritative.

Expediency of Codification admitted practically by such treatises, etc.

FRAGMENTS

OF A

SCHEME OF A CRIMINAL CODE.

FRAGMENTS OF A SCHEME OF A CRIMINAL CODE.

NOTES ON CRIMINAL LAW.

The Criminal [or Penal] Code [or the Law of Crimes and punishments].	The Code [or Law] of Criminal Process [or Procedure] and Preventive Police.

General Part [or Part I.]: Comprising the matters (definitions, distinctions, rules, principles, etc.) which apply universally or generally: *i. e.* which have no exclusive or special regard to crimes of a given class, but regard indifferently all or the generality of the crimes embraced by the intended Code [or, particularized (or specified) in the Particular (or Special) part].	Particular (or Special) Part, or Part II. Particularizing (or specifying) the various crimes embraced by the intended Code; and assigning respectively to those various crimes, their respective punishments and other penal consequences.

[Each part to be divided into Chapters, Sections, Subsections, etc.; or into Books, Chapters, Sections, Subsections, etc.]

NOTE.

"Punishment" (and "penal") are broader expressions than "crime" (and "criminal"). Punishment (or *pœna*) is necessarily annexed to an injury considered as a crime or public wrong: *i. e.* as the possible ground of a criminal or public action; and the infliction of punishment is necessarily the scope or object of every such action or pursuit.

But punishment, moreover, is sometimes annexed to an injury considered as a civil or private wrong: *i. e.* as the possible ground of a civil or private action. And the infliction of punishment is sometimes the scope or object of such an action or pursuit. Consequently, the nature of "crime" (and "criminal") cannot be determined sufficiently by merely determining the nature of "punishment" (and "penal").]

GENERAL PART OF THE CRIMINAL CODE.

CHAPTER I.

The definition of a crime; with distinctions (or divisions) of crimes into certain of their principal classes.

CHAPTER II.

Of the territory embraced by the intended Code; and of the persons amenable to, and the crimes cognizable by, the criminal tribunals having jurisdiction therein.

Reference to the subsequent Chapter on Punishments; and to those parts of the Code of Procedure which determine the respective jurisdictions of the several criminal Tribunals.

[This distinction or division can hardly serve as a basis for the Arrangement of Crimes.]

CHAPTER III.

Of such essentials of a crime (or of such conditions necessary to render an act or omission a crime) as may be treated of generally: *i. e.* without restriction to a crime of a given or specified class.

Here, particularly, of those universal essentials which are styled emphatically "the grounds of imputation."

CHAPTER IV.

Of consummate crimes and criminal attempts.

CHAPTER V.

Of principals and accessories.

CHAPTER VI.

Of punishments (including the penal consequences which are not punishments nominally, but which are punishments in effect).

THE

GENERAL PART OF THE CRIMINAL CODE.

CHAPTER I.

Containing the definition of a Crime; with distinctions (or divisions) of Crimes into certain of their principal classes.

1. The definition of a Crime. [or, Crimes distinguished from Civil Injuries.]. [or, Public Injuries (or Wrongs) distinguished from Private.]

The definition of a Crime implies the definition of Punishment, and *also* the distinction between Civil and Criminal Actions. But the complete statement of this distinction, and of its numerous and intricate consequences, belongs to the Code of Criminal Process.

2. Of such distinctions (or divisions) of crimes as are founded on differences between their respective punishments; [between the criminal tribunals to which they are respectively attributed; and between the criminal processes by which they are respectively pursuable.]

NOTE.

The distinction between Crimes in respect of tribunals and processes, supposes a reference to the Code of Criminal Process: in which the competence of the various tribunals must of course be determined; and in which the regular process, with the processes deviating from the regular, are particularized or detailed.

The distinction between Felonies and Misdemesnors supposes a reference to the Chapter (contained in a subsequent portion of the General Part of the Criminal Code) on Punishments and other Penal Consequences.

Quære. The use of retaining the distinction between Felonies and Misdemesnors? It is founded on differences between their respective punishments and other penal consequences. And to every crime particularized in the Particular Part of the Criminal Code, its punishment (and other penal consequence) will of course be assigned.

The distinction in the French Penal Code between Crimes, Delicts and Contraventions, is perhaps of some use. For offences of those different classes are attributed systematically and exclusively to differently constituted tribunals: They also are pursuable respectively by different processes.

Method of arrangement in the French Penal Code.

Crimes attributed to the Courts of Assize, and pursuable by a process which is more solemn (and regular): Called, emphatically, *Crimes*.

Crimes attributed to the Tribunals of Police, and pursuable by processes which are more summary (and irregular).

- Pursuable before the Tribunals of *Correctional* Police. — Called *Delicts*.
- Pursuable before the Tribunals of *Simple* Police (or Tribunals of Police). — Called *Contraventions*, or *Crimes of Simple Police*.

[The 1st and 2d Books, with the "Preliminary Dispositions," constitute the *General Part*: The 3d and 4th books, The *Particular Part*.]

CRIMES

attributed (generally[1]) to the ordinary (or regular) tribunals,[2] and pursuable (generally[3]) by the ordinary or regular process.[4])

Felonies. Misdemesnors.

Distinguished by differences between the punishments (and the other penal consequences) which are respectively annexed to them.

[[1] Not universally: For treason by a peer (for example) is cognizable by the House of Lords, although it is a felony. [Q^e^. Whether the House of Lords can now be deemed an ordinary criminal tribunal?]

[2] *E.g.* The King's Bench; the temporary tribunals formed by the ordinary commissions, etc. etc.

[3] Not universally; though cognizable by the regular tribunals. *E.g.* Peculiarities of process in case of treason.

[4] Indictment.]

CRIMES

attributed to extraordinary (or exceptional) tribunals, and pursuable by extraordinary (or exceptional) processes.

E.g.

Crimes pursuable summarily before Justices of the Peace, or before Commissioners of the Excise. Crimes pursuable before the Ecclesiastical Courts. Crimes by military persons considered as such, and punishable before Courts Martial, etc. etc.*

[* Q^e^. Whether the term *misdemesnor* is applicable to any of the crimes here contemplated? And whether there be any distinction between such crimes, or any of them, analogous to the distinction between Felonies and Misdemesnors?

The simple "police crimes" of the French Penal Code comprise only a part of the crimes here contemplated.]

NOTE.

Q^e^. The extent of the intended Code in respect of the Classes of Crimes which it is meant to embrace.

Is it to embrace *all* crimes (crimes pursuable before the extra-

ordinary, as well as before the ordinary tribunals)? Or are any, and which, of the crimes pursuable before the extraordinary tribunals, to be excluded from it? Difficulty of such an exclusion, in respect of such of the excluded crimes as owe their creation to unwritten law. See the last article of the French Penal Code, which shows that the code extends only to a part of the field embraced by the Criminal Law obtaining in France.

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3. Distinction (or division) of crimes into Public Crimes and Private Crimes [or Private Crimes and Public Crimes].

[The arrangement of the *Particular* Part of the Criminal Code is founded on the distinction between Private and Public Crimes. But perhaps the nature of the distinction ought to be stated or indicated at the outset of the *General* Part.]

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4. Distinction (or division) of crimes into *crimes by commission* and *crimes by omission* [or, *positive crimes* and *negative crimes*:—"crimes *faciendo*" and "crimes *non faciendo*"].

Distinction of crimes by omission into *crimes by omission accompanied with criminal knowledge*, and *crimes by omission from negligence* (*or criminal inattention*). [Refer to Chapter III.]

[Crimes by omission accompanied with criminal knowledge might be styled commodiously *criminal forbearances*; crimes by omission from negligence, *criminal omissions*, or *omissions* (simply).—But established language would hardly admit of this.]

NOTE.

Criminal knowledge and negligence are often styled emphatically "the grounds of imputation;" inasmuch as the one or the other of them is of the essence (or *corpus*) of every delict (or crime). Properly, however, *every* essential of a given crime (or every constituent of its essence or *corpus*) is one of the grounds or reasons for imputing the fact to the party. (See Table II., *post*.)

CHAPTER II.

Of the *Territory* which the intended Code is meant to embrace; and of the persons amenable to, and the crimes cognizable by, the Criminal Tribunals or Courts having jurisdiction therein.

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1. *Q*. The extent of the intended Code in respect of territory.

Is it to extend to *all* those parts of the United Kingdom and its Dependencies in which the Criminal Law of England now obtains?

If any of those parts are not to be embraced by it, how is their exclusion to be marked?

In respect to any of those parts embraced by it, in which anomalies or singularities now obtain,—how are such anomalies to be treated? Is the Code to supersede them? and, if so, how is the abrogation of them to be accomplished? If the Code is not to supersede them, are they also to be codified or systematized? (Provincial Law, derogating from the General or Common Law, has been codified or systematized in Prussia with respect to one of the Provinces.)

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2. Persons amenable to the Criminal Tribunals having jurisdiction within the intended territory.

A statement of the general rule, or general principle.

Exceptions from the general rule: *e.g.* the King, corpo-

rate bodies in their corporate capacity, Ambassadors from foreign States, etc. etc.*

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3. Crimes cognizable by such tribunals.

A statement of the general rule or principle.

Exceptions from the general rule:

E.g. Crimes committed by British subjects in foreign parts.

CHAPTER III.

Of such essentials of a Crime [or, of such conditions necessary to render an act or omission a crime] as may be treated of generally: *i.e.* without restriction to a crime of a given or specified class. Here, particularly, of those universal essentials which are styled emphatically "the grounds of imputation."

Principle 1. An act or omission is not a crime, (or is not imputable to the party,) unless the party knew, or, with due attention, might have known, that, under the circumstances of the fact, it was a crime; [or, an act or omission is not a crime, (or is not imputable to the party,) unless the party subsumed the fact, or, with due attention, might have subsumed the fact, under the law.].

Every crime, therefore, supposes, on the part of the criminal, *criminal knowledge* [criminal consciousness] or *negligence* [criminal inattention, criminal inadvertence].—*Vel scienter vel negligenter.*

NOTE.

Scheme of the Roman law-language in regard to the grounds of imputation: *i. e.* Criminal knowledge and Negligence.

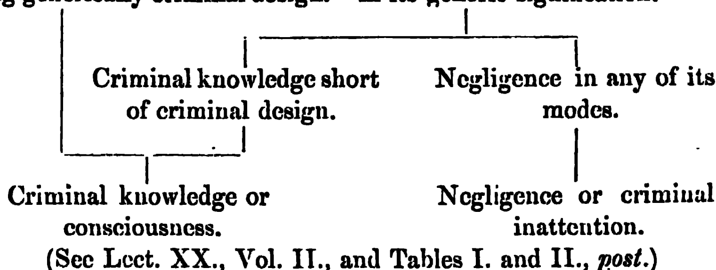
Dolus or *dolus malus*, when used as the name of a *genus*, is equivalent to *malice* or *criminal design*. When used as the name of a *species*, it is restricted to *criminal design consummated or attempted by fraud*: *dolus* with *simulatio*.

Culpa (which generally, though not always, is opposed to *dolus*) has three significations. 1°. Taken with its large signification, *culpa*, is equivalent to the English *guilt*. 2°. Taken with its narrower signification, it denotes generally the ground of imputation: *i. e.* criminal knowledge *or* negligence. It therefore includes *dolus*. 3°. Taken with its narrowest signification, it denotes

criminal knowledge *short of criminal design*, or negligence. It therefore excludes, and is opposed to, *dolus*.

The Roman law-language in regard to the grounds of imputation, may therefore be presented thus:—

Dolus, or *dolus malus*, as signifying generically criminal design. *Culpa*, as opposed to *dolus* in its generic signification.



(See Lect. XX., Vol. II., and Tables I. and II., *post*.)

Inconveniences of "*malice*" as a name for criminal design.

1. It having been assumed inconsiderately that malice or criminal design is of the essence of *every* crime, the term is extended abusively to negligence (or criminal inattention), and to criminal knowledge short of criminal design. *E.g.* Murder is styled malicious, or the law (it is said) implies it to be malicious, although, in truth, it proceeded from negligence: *i. e.* from negligence evincing, on the part of the criminal, extraordinary inhumanity. Case of master killing apprentice, without designing his death, by a cruel excess of punishment.

2. Malice as signifying criminal design, (and as used with its technical and proper import,) is often confounded with malice as denoting malevolence; insomuch that malevolence (though the motive or inducement of the party is foreign to the question of his guilt or innocence) is supposed to be essential to the crime. *E.g.* The law (it is said) implies malice, wherever the fact was premeditated; although the crime is complete by virtue of the criminal design, and any implication is superfluous. (Bellingham's argument.)

Similar ambiguity, and consequent confusion, in regard to *dolus*.

3. Though "malice" denotes properly criminal design or intent, it sometimes signifies criminal knowledge short of criminal design. It seems, at least, that "maliciously" is sometimes equivalent to "*scienter*." (*Sed q*[e].)

[(*a*) Criminal knowledge [or consciousness].

Criminal [unlawful, or evil] *design* [intent, or purpose].

[Equivalent to the *malice* of the English Law; to the *dolus* or *dolus malus* (used generically) of the Roman; and also to the *malum propositum*, the *malum consilium*, and the *voluntas nocendi* of the Roman.]

Where the production of the mischievous consequence which the law seeks to prevent, is an *end* (or object), ultimate or mediate, of the criminal; and where, therefore, the criminal *wishes* (or *wills*) the production of it: *E. g.* Murder, or arson, out of malevolence; murdering to rob; theft. In each of these cases, the production of the mischievous consequence is the very end of the criminal, or, at least, is a mean to its attainment.

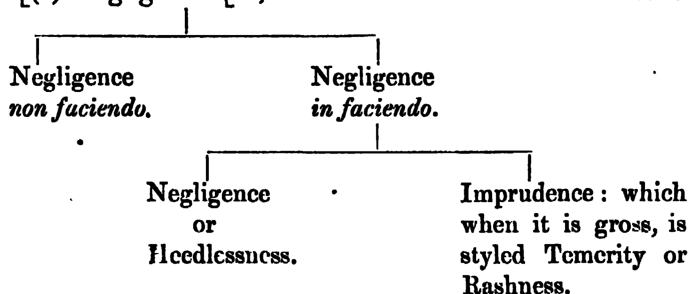
[Where an act or omission is of itself a crime, (or is a crime without respect to a consequence,) such act or omission (supposing that the omission is accompanied with criminal knowledge) imports necessarily a criminal design.]

Criminal knowledge short of criminal design.

[*Scientia*, but without the "*voluntas nocendi*." Not *dolus*, although it is *prope dolum*.]

Where the production of the mischievous consequence which the law seeks to prevent, is not an end, ultimate or mediate, of the criminal; but where he *knows* that such mischievous consequence (though he does not *wish* the production of it) will follow, necessarily or probably, his act or omission. *E.g.* Arson of a house adjoining his own, through his setting fire to his own, with intent to defraud his insurers. The destruction of his neighbour's house will not subserve his end; but he knows that the destruction of his neighbour's house will follow, necessarily or probably, the firing of his own.

[(*b*) Negligence. [or, criminal inattention or inadvertence.]



(See Table II., *post*, and Lecture XX., Vol. II.)

Negligence, or criminal inattention, may be divided into *proximate* and *remote*: *proximate*, where it accompanies (or is the immediate cause of) the criminal omission or act; *remote*, where it has caused an inability, on the part of the criminal, to do or forbear as he ought.

Amount (or measure) of the attention which the criminal law exacts; with the various degrees of negligence (or criminal inattention). *Culpa lata*, etc. Impossible to fix a measure, or to distinguish degrees, by rules binding the tribunals: but principles (with examples), serving as guides to their discretion, may be stated or indicated in the law.

(*c*) Of the cases in which a party committing or attempting a crime, produces *casually* or *negligently* an extrinsic mischief. Peculiarity (and seeming unreasonableness) of the English Criminal Law in respect of extrinsic mischief, produced *casually*.

Culpa dolo determinata. But, properly, the original crime or attempt is one crime, and the extrinsic mischief proceeding from the negligence of the party is another and distinct crime.

(*d*) Justifications deducible from principle 1, viz.

Ignorance (including mistake) in regard to matter of fact.

[Ignorance of law is neither a justification nor an excuse, as considered substantively or *per se;* although it is implied by some of the justifications and excuses which are adverted to hereafter. Why a knowledge of the law, on the part of the accused, is and must be presumed *juris et de jure.* Inasmuch as the presumption in question often conflicts with the fact, and the accused might be ignorant of the law without a default of his own, the presumption is seemingly unreasonable, and demands a short explanation.*]

Infancy: When a justification. When, and in what degree, an excuse.

Insanity: (in its various modes of idiocy, imbecility, lunacy, partial madness, etc.)

[Drunkenness: Never a justification. When, and in what degree, an excuse.—Ground for imputing the fact to the drunken party, where the drunkenness was not resorted to as a means of accomplishing or concealing a criminal design.]

Principle 2. An act or omission is not a crime, if it be purely *involuntary; i.e.* if the not doing the act† done, or the doing the act omitted, did not depend anywise on the wishes (or will) of the party.

Justifications deducible from principle 2, viz.:

Misfortune. [Mishap, chance, accident, *casus, damnum fatale,* etc.]

Compulsion or restraint merely physical: *i.e.* not applied to the wishes (or will) of the party.

Principle 3. Generally, an act or omission is not a crime, or is more or less excusable, if it proceeded from an instant

* See Lecture XXV., Vol. II.

† Inasmuch as the party is mentally passive, it cannot be said, with perfect propriety, that he acts.

and well-grounded fear stronger than the fear naturally inspired by the law.

(*a*) Statement and explanation of principle 3.

(*b*) Justifications deducible from principle 3.

Fear of harm not impending from the will of man.

Fear of (unlawful) harm impending from the will of man. *E.g.* Joining a foreign enemy through fear of instant death. Wife joining in a crime in consequence of threats from husband. [The English Criminal Law in respect of coercion of wife by husband, is seemingly full of inconsistencies.]

Note.—Principles 1. 2. and 3. are all of them deducible from the following simple truth. Owing to the plight in which the party was, fear of the punishment could not have acted upon him; or, if fear of the punishment could have acted upon him, it could not, or probably would not, have deterred him from the act or omission. Consequently, the infliction of the punishment on the party could not operate as an example, or could not produce the effect of deterring others from crime.

Principle 4. An act or omission pursuant to a legal duty is not a crime:

E.g. Arrest of a criminal. Execution of a judgment.

Principle 5. An act or omission pursuant to a legal right, or to a permission or licence granted or authorized by the law, is not a crime.

(*a*) Of self-defence, with its various grounds and limits.

Also, generally, of self-assistance (or of righting one's self without a resort to justice.) (*Sed qᵉ.*)

(*b*) Of the cases in which the fact concurs with the wishes of the party who is immediately its object.

Where the party acting or omitting is also the immediate object of the act or omission: *E.g.* Suicide.

Where the party acting or omitting is not the immediate object of the act or omission. "*Volenti non fit injuria.*" When the maxim holds. When it does not.

(c) Of the cases in which the party who is the immediate object of the act or omission is "out of the protection of the law."

Q^e. Whether there be any such case according to the *criminal* law now in force?

Principle 6. An *overt* act (or such an act, other than a confession of the party, as indicates his criminal knowledge) is of the essence of a crime by commission; also of a crime by omission accompanied with criminal knowledge.

[An overt act is an act *indicating criminal knowledge*, and is not *any* act *indicating a foregone crime*. Consequently, it is not of the essence of a crime by omission, where the omission is the effect of negligence. But such a crime by omission may be indicated by an overt act as meaning *any* act indicating a foregone crime.]

Why criminal knowledge without an overt act (or merely disclosed by the confession of the party) is not imputable.

Note.—Perhaps the term "*overt* act" is restricted to such an act as indicates a criminal design; or even to such an act as accomplishes or subserves the design.

Unless the act were a mean to the accomplishment of a criminal design (or were an effect or consequence of a foregone criminal design) it hardly could show the existence of the requisite ground of imputation: viz. the criminal knowledge of the party. (*Sed q^e.*) For a design may be merely criminal in respect of a probable consequence *not wished by the party*. And, in this case, an act indicating his knowledge of the probable mischievous consequence is not of necessity an act accomplishing or subserving the design.

It would seem that the overt act which is requisite in the case of an *attempt*, is necessarily an act consequent on a criminal design, or serving as a mean or step to the accomplishment of a criminal design. (*Sed q^e.*)

It is held by the Court of Cassation, in cases of an *attempt*, that "overt or exterior act" and "commencement of execution" are equivalent expressions.—(See Feuerbach and other German Criminalists.)

CHAPTER IV.

Of consummate Crimes, and of Crimes consisting in attempts to commit crimes. [or, criminal attempts.]

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1. Generally, an attempt to commit a crime is of itself a crime. (Exceptions from the rule.)

2. Essentials of a criminal attempt.

No criminal attempt without criminal knowledge.

[Or, No criminal attempt without a criminal design: *i. e.* unless the consummation of a crime be the end or object of the party, or be a mean or step towards his end or object. (*Sed q*.) For though a design be innocent independently of a probable mischief *not wished by the party*, his attempt may perhaps be criminal if he be *conscious* of the danger.]

No criminal attempt without an overt act: *i. e.* an act, (other than a confession) indicating criminal knowledge.

[Or, No criminal attempt without an overt act: *i. e.* an act which is the natural effect of a foregone criminal design, or which serves as a mean or step to the accomplishment of a criminal design. (*Sed q*.)]

3. Grounds for punishing a criminal attempt less severely than the corresponding consummate crime.

[In some cases, the consummation of the crime is not more mischievous than the attempt to commit it. *E. g.* Theft consummated by the merest amotion of the subject from the place which it occupied, is not a whit more mischievous than an abortive attempt to amove it.]

Expediency of leaving to the party a *locus pœnitentiæ*, wherever the consummation of the crime would be more mischievous than the attempt, etc. etc.

[Departures from this principle in the English Criminal

law. They are not only inexpedient, but are out of analogy or harmony with the body of the system. Coventry Act, Lord Ellenborough's Act, etc.—Absurdity of the Roman and French Law in this respect.]

4. Distinction between a *remote* or merely incipient attempt [*i. e.* where the acts of the party would not naturally consummate the crime] and a *proximate* or perfect attempt [*i. e.* where the acts of the party would naturally consummate the crime, but the consummation is prevented by the intervention of an extrinsic cause.] (*Q*[e].)

Note.—Case of an *omission* not followed by the probable mischief which renders it criminal; but where the omitting party intended the mischief, or, at least, was conscious of the danger.

Cannot be called an *attempt:* for an attempt imports an *act* pursuant to a criminal design, or, at least, indicating criminal knowledge.

Is there any case (in the English Criminal law) in which a party so omitting would be held liable *as for an attempt?*

[*Note.*—Would it be expedient to define generally *Corpus delicti: i. e.* the sum (or aggregate) of the properties (or characters) which constitute the essence (or definition) of a crime of a given class? If so, the general definition and explanation would be placed appositely in Chapter III. For the expression "*corpus delicti,*" an equivalent English expression (such, for example, as "*essence of the crime*") might easily be devised.] (See Table II. *post.*)

5. Distinction between criminal attempts in respect of differences between the causes which prevent their consummation.

Where the consummation is prevented by the penitence of the party.

Where the consummation is prevented, not by the penitence of the party, but by the intervention of an extrinsic cause.

6. Incitements to crime. [*Sed q*[e]. Would perhaps be placed more appositely in the Chapter on Principals and Accessories.]

CHAPTER V.

Of Principals and Accessories.

[*Q*. Can a so-called "accessory *after the fact*" be deemed an *accessory*: *i. e.* a person who aided the given crime, and who therefore must have been party to it before its conclusion? Ought not the offence of the so-called Accessory to be placed in a Chapter of the Department relating to Public Crimes?]

CHAPTER VI.

Of Punishments (including those consequences of crimes which are not punishments nominally, but which are punishments in effect).

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1. Enumeration and description of the punishments (and other penal consequences) which are annexed to Crimes by the English Criminal Law: (or by the portion of the English Criminal Law which is embraced by the intended Code.)

E.g. Death.
Transportation.
Imprisonment.
Fine, etc.

General Forfeiture. Corruption of blood (with Escheat). Incapacity to give testimony, etc.	Q°. As to the expediency of these sweeping and indiscriminating punishments.

2. Rules (or Instructions) for the application of Punishments.

(a.) Where the nature of the punishment is not determined by the Law; or where the degree of the punishment is indeterminate altogether; or where the degree of the punishment, though not indeterminate altogether, is determined imperfectly or proximately by the assignment of a *maximum* and *minimum*.

Specimens of the various considerations which are grounds for the Rules or Instructions, viz.

Magnitude of the mischief which the crime has a tendency to produce.

Difficulty or ease with which it may usually be committed.

Consummation or Attempt; If attempt, nature of the cause which rendered it abortive.

Criminal Knowledge or Negligence: If negligence, the degree of it.

Motive or inducement to the crime: which, though it commonly is foreign to the question of guilt or innocence, is often a good reason for aggravating or mitigating the punishment.

Disposition of the criminal, as evinced by the fact in question, or by extrinsic testimony to his general character, etc. etc.

(b.) In the case of a repetition of the crime.

(c.) In the case of concurrent crimes (or, rather, concurrent convictions).

3. Extinction of liability to punishment (or to a criminal action or pursuit).

By sufferance of the punishment.

By Death.

By Prescription, or limitation of time.

By Pardon, etc. etc.

THE PARTICULAR PART OF THE CRIMINAL CODE. (1.)

Private Crimes; *i. e.*

Crimes by private persons (*i. e.* merely private persons, or public persons in private characters), which affect directly and specially the rights of private persons (*i. e.* merely private persons, or public persons in private characters).

Public Crimes.

Crimes affecting directly and specially public or political persons in their public or political characters; with crimes by such persons in the same characters.

- Crimes which affect directly and specially the State or Sovereign Government: *i. e.* the entire State, or any of its constituent and necessary parts.
  - Crimes of which the purpose is the *subversion* of the State; or which tend to such subversion (although it be not their purpose), by necessary or probable consequence.
    [High Treason, *Perduellio.*]
  - Crimes short of High Treason.
    [*Crimina læsæ Majestatis.*]
- Crimes which affect directly and specially the rights or powers of subordinate public persons.
- Crimes by subordinate public persons in their public characters.

A classification of the departments into which the subordinate government of the country is most commodiously divisible; (or, a classification of the persons who may be deemed political subordinates;) with the crimes by and against the various individuals and bodies who are members of those departments respectively.

Crimes not affecting, (or not affecting directly and specially,) any determinate person, public or private. Crimes against the public (or community), as considered generally and indeterminately.

[Subjects of *Police Law*, in one of the senses of the term.]

E. g.

Usury;—Forestalling, regrating; obtaining an unlawful monopoly:—Combinations amongst workmen or masters:—Gambling:—Setting up bubbles, etc.

Offences against the public peace. Going unlawfully armed:—Common affrays:—Libel (as considered by the English Criminal Law), etc.

Common Nuisances.

Breach of Quarantine: selling unwholesome provisions: etc.

Offences against Religion (not amounting to offences against ministers of religion, or against religious societies).

Offences *contra bonos mores.* Self-regarding offences; such as suicide, etc.

CODE (OR LAW) OF CRIMINAL PROCEDURE AND PREVENTIVE POLICE.*

Criminal Procedure.

[Search for and pursuit of crimes already committed. End, prevention of crimes through the infliction of punishment on past crimes.]

1. Ordinary and Extraordinary Tribunals, with their respective competence, and jurisdiction.

2. Ordinary Procedure.

Up to accusation (by indictment or information). [*Police judiciaire.*]	After accusation. [*La justice.*]

3. Extraordinary modes of Procedure [marking only the anomalies; and referring, for the general rules, to the ordinary Procedure].

Preventive Police.

[End, prevention of crimes, but not through the infliction of punishment. Embracing such means of preventing crimes as are not comprised in criminal process.]

Rules for regulation of prisons (penal, or prisons of detention), of transport vessels, etc. [Q^e.]

Generalia.

Distinction between civil and criminal actions.

Where they concur.

Where the one excludes the other.

Where they are pursuable jointly.

Where they are pursuable separately.

Rules of evidence peculiar to criminal cases.

* Different meanings of the word Police:—

1. Preventive Police.—2. Laws which prevent mediately.—3. Laws administered by inferior tribunals.—4. Laws which impose duties, regarding the community generally. A mixture of all these.

TABLE I.

(1) *Culpa, sensu lato.*
Equivalent to the English *Guilt;* and therefore comprising all the elements which constitute the *Corpus* (or essence) of the given delict (or crime).

(2) *Culpa, sensu medio.*
Comprising criminal intention; criminal knowledge short of criminal intention, or negligence. [Which three, together with dependence on wishes of party of the forbearance or performance due, are sometimes called emphatically "the grounds of imputation."]

All the constituents of the given *Corpus delicti*, excepting criminal intention, criminal knowledge short of criminal intention, or negligence. [Sometimes deemed the *Corpus delicti:* being the difference, though not the *whole* essence, of the given crime.]

(a) *Dolus (in specie): i.e.* criminal intention consummated or attempted by fraud: *dolus* with *simulatio.*

(b) *Dolus (in genere).* Equivalent to criminal intention: [*Scientia*, with the *voluntas nocendi.*]

(3) *Culpa, sensu stricto.*

Criminal knowledge short of Criminal Intention: [*Scientia*, but without the *voluntas nocendi: Prope dolum*, but not *dolus.*]

Criminal knowledge *in genere.*

Negligence.

Non faciendo.

In faciendo.

Heedlessness.

Imprudence: a mode of which is Temerity.

Note.—Generally, an act, forbearance, or omission, which is merely culpose (or not dolose), is not a crime or public delict: i. e. the possible ground of a criminal or public action. It is merely a civil or private injury, or is merely the possible ground of a civil or private action. Hence, probably, the frequency of the assumption that criminal intention is of the essence of a crime.

TABLE II.

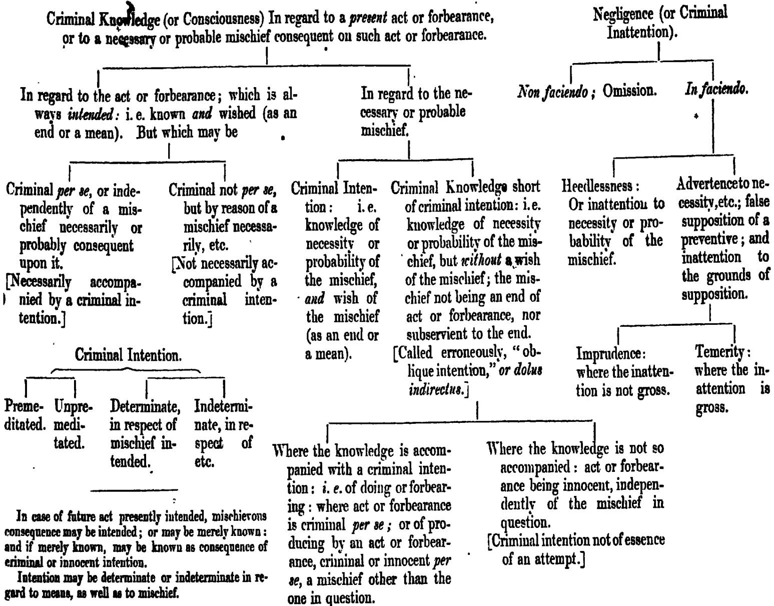
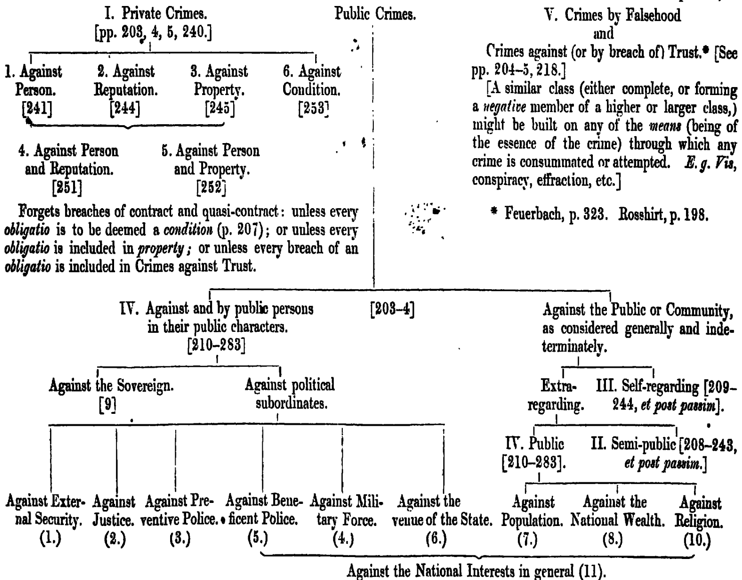


TABLE III.

(Division, p. 201–294. Remarks on the grounds of the division, p. 295. Characters of the Five Classes of Crimes, p. 300.)



All the figures in this Table refer to Bentham's Principles of Morals and Legislation, 4to edition 1789.—*S. A.*

ON THE USES

OF

THE STUDY OF JURISPRUDENCE.

The matter of the following Essay is chiefly taken from the Opening Lectures of the two several Courses delivered by Mr. Austin at the London University and at the Inner Temple. The first ten lectures of the former and longer Course were published (greatly altered and expanded) by the Author, in a volume bearing the title of 'The Province of Jurisprudence Determined;' which has been republished since his death. The form and character which he gave to that work rendered an Introductory Lecture superfluous and inappropriate. It was consequently omitted; nor was there any use or place assigned to it.

It is evident that a discourse of the kind could not, with any fitness, be prefixed to the subsequent Lectures of that Course, now first published.

The second Opening Lecture was likewise necessarily excluded by the Author's arrangement; according to which the lectures delivered at the Inner Temple were (as I have said elsewhere) incorporated with the previous and longer Course. Like the former, this therefore remained without any designated place.

Such however, I knew, was Mr. Austin's sense of the importance of the study of Jurisprudence, that if he had completed any work containing the full expression of his opinions, all that is here gathered together (and probably much more) would doubtless have been urged in favour of its cultivation. I have therefore thought it right to preserve and to consolidate whatever was of permanent value in these two Introductory Lectures, and have incorporated with them some fragments on the subject of which they treat. In this instance, and in this alone, I have presumed to make some slight changes in the form of what he wrote; I have united the two discourses, the subject and purport of which

is the same, into one continuous Essay; omitting inevitable repetitions and supplying a few links from other sources.

The Table at the end does not belong to either Lecture, nor to any part of the matter above described. I found it among loose scraps, with no mark or reference as to its destination. Perhaps it belonged to a few notes relating to the work "On the Principles and Relations of Jurisprudence and Ethics," which he meditated.* As it gives a brief but comprehensive view of his Idea of the course of study necessary to the forming of an accomplished Lawyer or Statesman, it seemed to find its place with this Essay.

* See Vol. I., Preface, p. xxiv.

ON

THE STUDY OF JURISPRUDENCE.

THE appropriate subject of Jurisprudence, in any of its different departments, is positive law: Meaning by positive law (or law emphatically so called), law established or "positum," in an independent political community, by the express or tacit authority of its sovereign or supreme government.

Considered as a whole, and as implicated or connected with one another, the positive laws and rules of a particular or specified community, are a system or body of law. And as limited to any one of such systems, or to any of its component parts, jurisprudence is particular or national.

Though every system of law has its specific and characteristic differences, there are principles, notions, and distinctions common to various systems, and forming analogies or likenesses by which such systems are allied.

Many of these common principles are common to all systems;—to the scanty and crude systems of rude societies, and the ampler and maturer systems of refined communities. But the ampler and maturer systems of refined communities are allied by the numerous analogies which obtain between all systems, and also by numerous analogies which obtain exclusively between themselves. Accordingly, the various principles common to maturer systems (or the various analogies obtaining between them), are the subject of an extensive science: which science (as contradistinguished to national or particular jurisprudence on one side, and,

on another, to the science of legislation,) has been named General (or comparative) Jurisprudence, or the philosophy (or general principles) of positive law.

As principles abstracted from positive systems are the subject of general jurisprudence, so is the exposition of such principles its exclusive or appropriate object. With the goodness or badness of laws, as tried by the test of utility (or by any of the various tests which divide the opinions of mankind), it has no immediate concern. If, in regard to some of the principles which form its appropriate subject, it adverts to considerations of utility, it adverts to such considerations for the purpose of explaining such principles, and not for the purpose of determining their worth. And this distinguishes the science in question from the science of legislation: which affects to determine the test or standard (together with the principles subordinate or consonant to such test) by which positive law ought to be made, or to which positive law ought to be adjusted.

If the possibility of such a science appear doubtful, it arises from this; that in each particular system, the principles and distinctions which it has in common with others, are complicated with its individual peculiarities, and are expressed in a technical language peculiar to itself.

It is not meant to be affirmed that these principles and distinctions are conceived with equal exactness and adequacy in every particular system. In this respect, different systems differ. But in all, they are to be found more or less nearly conceived; from the rude conceptions of barbarians, to the exact conceptions of the Roman lawyers or of enlightened modern jurists.*

* Universal Jurisprudence is the science of the *Jus Gentium* of the Roman Lawyers, as expounded by Gaius.

Mr. Bentham is of opinion that it must be confined within very narrow bounds. This is true, if by expository Universal Jurisprudence he intended, Jurisprudence expository of that which *obtains* universally as Law.

For (1°) Assuming that the systems of all nations, wholly or in part, exactly resembled each other (*i. e.* that all or many of the provisions to be

I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction.

Of the principles, notions, and distinctions which are the subjects of general jurisprudence, some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it.

Of these necessary principles, notions, and distinctions, I will suggest briefly a few examples.

1°. The notions of Duty, Right, Liberty, Injury, Punishment, Redress; with their various relations to one another, and to Law, Sovereignty, and Independent Political Society:

2°. The distinction between written or promulged, and unwritten or unpromulged law, in the juridical or improper senses attributed to the opposed expressions; in other words, between law proceeding immediately from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker (with the authority of a sovereign or supreme):

3°. The distinction of Rights, into rights availing against

found in those several systems were exactly alike), still we could not speak of them with propriety as forming a Universal Law; the sanction being applied *by the government of each community*, and not by a superior common to all mankind. And this (as we shall see hereafter) ranks international law with morals rather than with law.

(2°) As is observed by Mr. Bentham, the provisions of different systems are never precisely alike; the only parts in which they agree exactly, being those leading expressions which denote the necessary parts of every system of law. *E.g.* The Rights of husbands, wives, etc.; the law relating to easements here and *servitudes* in France, resemble or are analogous; but are still not precisely alike either in matter or form, and therefore cannot be described by the same form of words.

the world at large (as, for example, property or dominion), and rights availing exclusively against persons specifically determined (as, for example, rights from contracts):

4°. The distinction of rights availing against the world at large, into property or dominion, and the variously restricted rights which are carved out of property or dominion:

5°. The distinction of Obligations (or of duties corresponding to rights against persons specifically determined,) into obligations which arise from contracts, obligations which arise from injuries, and obligations which arise from incidents that are neither contracts nor injuries, but which are styled analogically obligations "quasi ex contractu:"

6°. The distinctions of Injuries or Delicts, into civil injuries (or private delicts) and crimes (or public delicts); with the distinction of civil injuries (or private delicts) into torts, or delicts (in the strict acceptation of the term), and breaches of obligations from contracts, or of obligations "quasi ex contractu."

It will, I believe, be found, on a little examination and reflection, that every system of law (or every system of law evolved in a refined community) implies the notions and distinctions which I now have cited as examples; together with a multitude of conclusions imported by those notions and distinctions, and drawn from them, by the builders of the system, through inferences nearly inevitable.

Of the principles, notions, and distinctions which are the subjects of General Jurisprudence, others are not necessary (in the sense which I have given to the expression). We may imagine coherently an expanded system of law, without conceiving them as constituent parts of it. But as they rest upon grounds of utility which extend through all communities, and which are palpable or obvious in all refined communities, they in fact occur very generally in matured systems of law; and therefore may be ranked properly with the general principles which are the subjects of general jurisprudence.

Such, for example, is the distinction of law into "jus personarum" and "jus rerum": the principle of the scientific arrangement given to the Roman Law by the authors of the elementary or institutional treatises from which Justinian's. Institutes were copied and compiled. The distinction, I believe, is an arbitrarily assumed basis for a scientific arrangement of a body of law. But being a commodious basis for an arrangement of a body of law, it has been very generally adopted by those who have attempted such arrangements in the modern European nations. It has been very generally adopted by the compilers of the authoritative Codes which obtain in some of those nations, and by private authors of expository treatises on entire bodies of law. Nay, some who have mistaken the import of it, and who have contemptuously rejected it, as denoted by the obscure antithesis of "jus personarum et rerum," have yet assumed it under other (and, certainly more appropriate) names, as the basis of a natural arrangement. Meaning, I presume, by a natural arrangement, an arrangement so commodious, and so highly and obviously commodious, that any judicious methodizer of a body of law would naturally (or of course) adopt it.

But it will be impossible, or useless to attempt an exposition of these principles, notions and distinctions until, by careful analysis, we have accurately determined the meaning of certain leading terms which we must necessarily employ; terms which recur incessantly in every department of the science: which, whithersoever we turn ourselves, we are sure to encounter. Such, for instance, are the following: Law, Right, Obligation, Injury, Sanction: Person, Thing, Act, Forbearance. Unless the import of these are determined at the outset, the subsequent speculations will be a tissue of uncertain talk.

It is not unusual with writers who call and think themselves "*institutional*," to take for granted, that they know the meaning of these terms, and that the meaning must be

known by those to whom they address themselves. Misled by a fallacious test, they fancy that the meaning is simple and certain, because the expressions are familiar. Not pausing to ask their import, not suspecting that their import can need inquiry, they cast them before the reader without an attempt at explanation, and then proceed (without ceremony) to talk about them and about them.

These terms, nevertheless, are beset with numerous ambiguities: their meaning, instead of being simple, is extremely complex: and every discourse which embraces Law as a whole, should point distinctly at those ambiguities, and should sever that complex meaning into the simpler notions which compose it.

Many of those who have written upon Law, have defined these expressions. But most of their definitions are so constructed, that, instead of shedding light upon the thing defined, they involve it in thicker obscurity. In most attempts to define the terms in question, there is all the pedantry without the reality of logic: the form and husk, without the substance. The pretended definitions are purely circular: turning upon the very expressions which they affect to elucidate, or upon expressions which are exactly equivalent.

In truth, some of these terms will not admit of definition in the formal or regular manner. And as to the rest, to define them in that manner is utterly useless. For the terms which enter into the abridged and concise definition, need as much elucidation as the very expression which is defined.

The import of the terms in question is extremely complex. They are short marks for long series of propositions. And, what aggravates the difficulty of explaining their meaning clearly, is the intimate and indissoluble connection which subsists between them. To state the signification of each, and to show the relation in which it stands to the others, is not a thing to be accomplished by short and

disjointed definitions, but demands a dissertation, long, intricate and coherent.

For example: Of Laws or Rules there are various classes. Now these classes ought to be carefully distinguished. For the confusion of them under a common name, and the consequent tendency to confound Law and Morals, is one most prolific source of jargon, darkness, and perplexity. By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and divisions which relate to law exclusively.

But in order to distinguish the various classes of laws, it is necessary to proceed thus:—To exhibit, first, the resemblance between them, and, then, their specific differences: to state *why* they are ranked under a common expression, and then to explain the marks *by which* they are distinguished. Till this is accomplished, the appropriate subject of Jurisprudence is not discernible precisely. It does not stand out. It is not sufficiently detached from the resembling or analogous objects with which it is liable to be confounded.

Thus, for example, in order to establish the distinction between Written and Unwritten Law, we must scrutinize the nature of the latter: a question which is full of difficulty; and which has hardly been examined with the requisite exactness, by most of the writers who have turned their attention to the subject. I find it much vituperated, and I find it as much extolled; but I scarcely find an endeavour to determine *what it is*. But if this humbler object were well investigated, most of the controversy about its merits would probably subside.

To compare generally, or in the abstract, the merits of the two species, would be found useless: and the expediency of the process which has been styled Codification, would resolve itself into a question of time, place, and circumstance.

The word Jurisprudence itself is not free from ambiguity; it has been used to denote—

The knowledge of Law as a science, combined with the art or practical habit or skill of applying it; or, secondly,

Legislation;—the science of what *ought to be done* towards making good laws; combined with the art of doing it.

Inasmuch as the knowledge of what ought to be, supposes a knowledge of what is, legislation supposes jurisprudence, but jurisprudence does not suppose legislation. What laws have been and are, may be known without a knowledge of what they ought to be. Inasmuch as a knowledge of what ought to be, is bottomed on a knowledge of antecedents *cognato genere*, legislation supposes jurisprudence.

With us, Jurisprudence is the science of what is essential to law, combined with the science of what it ought to be.* It is particular or universal. Particular Jurisprudence is the science of any actual system of law, or of any portion of it. The only practical jurisprudence is particular.

The proper subject of General or Universal Jurisprudence (as distinguished from Universal Legislation) is a description of such subjects and ends of Law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions.

And these resemblances will be found to be very close, and to cover a large part of the field. They are necessarily confined to the resemblances between the systems of a few nations; since it is only a few systems with which it is possible to become acquainted, even imperfectly. From these, however, the rest may be presumed. And it is only the systems of two or three nations which deserve attention; —the writings of the Roman Jurists; the decisions of En-

* For its meaning in the sense of the French, see Blondeau, Dupin, and others.

glish Judges in modern times; the provisions of French and Prussian Codes as to arrangement. Though the points are also few in which the laws of nations ought to be the same (*i. e.* precisely alike), yet there is much room for universal legislation: *i. e.* the circumstances not precisely alike may be treated of together, in respect of what they have in common; with remarks directed to their differences. Whether the principles unfolded deserve the name of Universal or not, is of no importance. Jurisprudence may be universal with respect to its subjects: Not less so than legislation.

It is impossible to consider Jurisprudence quite apart from Legislation; since the inducements or considerations of expediency which lead to the establishment of laws, must be adverted to in explaining their origin and mechanism. If the causes of laws and of the rights and obligations which they create, be not assigned, the laws themselves are unintelligible.

Inevitable (and sometimes intentional) implication of Legislation with Jurisprudence.

Where the subject is the same, but the provisions of different systems with respect to that subject are different, it is necessary to assign the causes of the difference; whether they consist in a necessary diversity of circumstances, or in a diversity of views on the part of their respective authors with reference to the *ends* of Law. Thus, the rejection or limited reception of entails in one system, and their extensive reception in another, are partly owing to the different circumstances in which the communities are placed;—partly to the different views of the aristocratic and democratic legislators by whom these provisions have been severally made.

So far as these differences are inevitable—are imposed upon different countries—there can be no room for praise or blame. Where they are the effect of choice, there is room for praise or blame; but I shall treat them not as subjects of either, but as *causes* explaining the existence of

the differences. So of the admission or prohibition of divorce—Marriages within certain degrees, etc.

Wherever an opinion is pronounced upon the merits and demerits of Law, an impartial statement of the conflicting opinions should be given. The teacher of Jurisprudence may have, and probably has, decided opinions of his own; but it may be questioned whether earnestness be less favourable to impartiality than indifference; and he ought not to attempt to insinuate his opinion of merit and demerit under pretence of assigning causes. In certain cases which do not try the passions (as rescission of contract for inadequacy of consideration) he may, with advantage, offer opinions upon merits and demerits. These occasional excursions into the territory of Legislation, may serve to give a specimen of the manner in which such questions should be treated. This particularly applies to Codification: a question which may be agitated with safety, because everybody must admit that Law ought to be known, whatever he may think of the provisions of which it ought to consist.

Attempting to expound the principles which are the subject of the science of Jurisprudence (or rather to expound as many of them as a limited Course of Lectures will embrace), he must not only try to state them in general or abstract expressions, but must also endeavour to illustrate them by examples from particular systems: especially by examples from the Law of England, and from the Roman or Civil Law.

Value of the Study of Roman Law.

For the following sufficient reason (to which many others might be added), the Roman or Civil Law is, of all particular systems, other than the Law of England, the best of the sources from which such illustrations might be drawn.

In some of the nations of modern Continental Europe (as, for example, in France), the actual system of law is mainly of Roman descent; and in others of the same

nations (as, for example, in the States of Germany), the actual system of law, though not descended from the Roman, has been closely assimilated to the Roman by large importations from it.

Accordingly, in most of the nations of modern Continental Europe, much of the substance of the actual system, and much of the technical language in which it is clothed, is derived from the Roman Law, and without some knowledge of the Roman Law, the technical language is unintelligible; whilst the order or arrangement commonly given to the system, imitates the exemplar of a scientific arrangement which is presented by the Institutes of Justinian. Even in our own country, a large portion of the Ecclesiastical and Equity, and some (though a smaller) portion of the Common, Law, is derived immediately from the Roman Law, or from the Roman through the Canon.

Nor has the influence of the Roman Law been limited to the positive law of the modern European nations. For the technical language of this all-reaching system has deeply tinctured the language of the international law or morality which those nations affect to observe. By drawing, then, largely for examples on the Roman or Civil Law, an expositor of General Jurisprudence (whilst illustrating his appropriate subject) might present an idea of a system which is a key to the international morality, the diplomacy, and to much of the positive law, of modern civilized communities.

It is much to be regretted that the study of the Roman Law is neglected in this country, and that the real merits of its founders and expositors are so little understood.

Much has been talked of the philosophy of the Roman Institutional writers. Of familiarity with Grecian philosophy there are few traces in their writings, and the little that they have borrowed from that source is the veriest foolishness: for example, their account of *Jus naturale*, in which they confound law with animal instincts; law, with

all those wants and necessities of mankind which are causes of its institution.

Nor is the Roman law to be resorted to as a magazine of legislative wisdom. The great Roman Lawyers are, in truth, expositors of a positive or technical system. Not Lord Coke himself is more purely technical. Their real merits lie in their thorough mastery of that system; in their command of its principles; in the readiness with which they recall, and the facility and certainty with which they apply them.

In support of my own opinion of these great writers I shall quote the authority of two of the most eminent Jurists of modern times.

"The permanent value of the Corpus Juris Civilis," says Falck, "does not lie in the Decrees of the Emperors, but in the remains of juristical literature which have been preserved in the Pandects. Nor is it so much the matter of these juristical writings, as the scientific method employed by the authors in explicating the notions and maxims with which they have to deal, that has rendered them models to all succeeding ages, and pre-eminently fitted them to produce and to develope those qualities of the mind which are requisite to form a Jurist."*

And Savigny says, "It has been shown above, that, in our science, all results depend on the possession of leading principles; and it is exactly this possession upon which the greatness of the Roman jurists rests. The notions and maxims of their science do not appear to them to be the creatures of their own will; they are actual beings, with whose existence and genealogy they have become familiar from long and intimate intercourse. Hence their whole method of proceeding has a certainty which is found nowhere else except in mathematics, and it may be said without exaggeration that they calculate with their ideas. If they have a case to decide, they begin by acquiring the most

* Jurist. Encyc., cap. ii. § 109.

vivid and distinct perception of it, and we see before our eyes the rise and progress of the whole affair, and all the changes it undergoes. It is as if this particular case were the germ whence the whole science was to be developed. Hence, with them, theory and practice are not in fact distinct; their theory is so thoroughly worked out as to be fit for immediate application, and their practice is uniformly ennobled by scientific treatment. In every principle they see a case to which it may be applied; in every case, the rule by which it is determined; and in the facility with which they pass from the general to the particular and the particular to the general, their mastery is indisputable."*

In consequence of this mastery of principles, of their perfect consistency ("elegantia"†) and of the clearness of the method in which they are arranged, there is no positive system of law which it is so easy to seize as a whole. The smallness of its volume tends to the same end.

The principles themselves, many of them being derived from barbarous ages, are indeed ill fitted to the ends of law; and the conclusions at which they arrive being logical consequences of their imperfect principles, necessarily partake of the same defect.‡

A subordinate merit of the Roman lawyers is their style, always simple and clear, commonly brief and nervous, and entirely free from *nitor*. Its merits are appropriate and in perfect taste. It bears the same relation to that of Blackstone and Gravina, which a Grecian statue bears to a milliner's doll in the finery of the season.

I by no means mean to put the study of the Roman Law on a level in point of importance with that of the Aris-

* Beruf, etc., cap. iv. p. 30.

† For this application of the word "elegantia" see Vol. II. p. 231.

‡ "Quanquam non ideo conclusiones semper probem, quæ sæpe ducuntur ex quibusdam veteris persuasionis apicibus, opinione consecratis."—*Leibnitz, Epist. ad Kestnerum*. This is the conclusion of the sentence quoted at p. 27.

totelic Logic (for the Roman Law is not *necessary*): but in the respect now under consideration, it bears the same relation to law and morals, which the school logic bears to philosophy.

The number of the analogies between the Roman Law and many of the Continental systems, and between the Roman and English Law, is not indeed to be wondered at: since those Continental systems and also our own system of Equity, have been formed more or less extensively on the Roman law; chiefly on the Roman, through the Canon. But the English law, like the Roman, is for the most part, indigenous, or comparatively little has been imported into it from the Roman. The coincidences show how numerous are the principles and distinctions which all systems of law have in common. The extensive coincidence of particular systems may be ascertained practically by comparing two expositions of any two bodies of law. The coincidence is pre-eminently remarkable in the Roman Law and the Common Law of England.

Uses of the Study of Jurisprudence. Having stated generally the nature of the science of Jurisprudence, and also the manner in which I think it ought to be expounded, I proceed to indicate briefly a few of its possible uses.

I would remark, in the first place, that a well-grounded study of the principles which form the subject of the science, would be an advantageous preparative for the study of English Law.

To the student who begins the study of the English law, without some previous knowledge of the *rationale* of law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But if he approached it with a well-grounded knowledge of the general principles of jurisprudence, and with the map of a body of law distinctly im-

pressed upon his mind, he might obtain a clear conception of it (as a system or organic whole) with comparative ease and rapidity.

With comparative ease and rapidity, he might perceive the various relations of its various parts; the dependence of its minuter rules on its general principles; and the subordination of such of these principles as are less general or extensive, to such of them as are more general, and run through the whole of its structure.

In short, the preliminary study of the general principles of jurisprudence, and the mental habits which the study of them tends to engender, would enable him to acquire the principles of English jurisprudence, in particular, far more speedily and accurately than he possibly could have acquired them, in case he had begun the study of them without the preparative discipline.

There is (I believe) a not unprevalent opinion, that the study of the science whose uses I am endeavouring to demonstrate, might tend to disqualify the student for the *practice* of the law, or to inspire him with an aversion from the practice of it. That some who have studied this science have shown themselves incapable of practice, or that some who have studied this science have conceived a disgust of practice, is not improbably a fact. But in spite of this seeming experience in favour of the opinion in question, I deny that the study itself has the tendency which the opinion imputes to it.

A well-grounded knowledge of the general principles of jurisprudence helps, as I have said, to a well-grounded knowledge of the principles of English jurisprudence; and a previous well-grounded knowledge of the principles of English jurisprudence, can scarcely incapacitate the student for the acquisition of practical knowledge, in the chambers of a conveyancer, pleader, or draftsman. Armed with that previous knowledge, he seizes the *rationale* of the practice which he there witnesses and partakes in, with comparative ease

and rapidity; and his acquisition of practical knowledge, and practical dexterity and readiness, is much less irksome than it would be in case it were merely empirical. Insomuch, that the study of the general principles of jurisprudence, instead of having any of the tendency which the opinion in question imputes to it, has a tendency (by ultimate consequence) to qualify for practice, and to lessen the natural repugnance with which it is regarded by beginners.

System adopted in Prussia.

The advantage of the study of common principles and distinctions, and of history considered as a preparative for the study of one's own particular system, is fully appreciated in Prussia: a country whose administrators, for practical skill, are at least on a level with those of any country in Europe.

In the Prussian Universities, little or no attention is given by the Law Faculty to the actual law of the country. Their studies are wholly or almost entirely confined to the general principles of Law; to the Roman, Canon, and Feudal law, as the sources of the actual system: the Government trusting that those who are acquainted with such general principles and with the historical basis of the actual system, will acquire that actual system more readily, as well as more groundedly, than if they had at once set down to the study of it, or tried to acquire it empirically.

"In the Prussian states," says Von Savigny, "ever since the establishment of the Landrecht, no order of study has ever been prescribed; and this freedom from restraint, sanctioned by the former experience of the German universities, has never been infringed upon. Even the number of professors, formerly required on account of the Common Law (*Gemeines Recht*), has not been reduced, and the curators of the universities have never led either the professors or the students to believe, that a part of the lectures, formerly necessary, were likely to be dispensed with. Originally it was thought advisable, that, in each university, one chair at least should be set apart for the Prussian law, and a

considerable prize was offered for the best manual. But even this was subsequently no longer required; and up to the present time the Prussian law has not been taught at the university of Berlin. The established examinations are formed upon the same principle; the first, on the entrance into real matters of business, turning exclusively on the common law: the next period is set apart for the directly-practical education of the jurisconsults; and the two following examinations are the first that have the Landrecht for their subject-matter; at the same time, however, without excluding the common law. At present, therefore, juridical education is considered to consist of two halves; the first half (the university) including only the learned groundwork, the second, on the other hand, having for its object the knowledge of the Landrecht, the knowledge of the Prussian procedure, and practical skill."*

The opinion I have expressed was that of Hale, Mansfield,† and others (as evinced by their practice), and was recommended by Sir William Blackstone, some eighty years ago.‡

Backed by such authority, I think I may conclude that the science in question, if taught and studied skilfully and effectually, and with the requisite detail, would be no inconsiderable help to the acquisition of English Law.

I may also urge the utility of acquiring the talent of seizing or divining readily the principles and provisions (through the mist of a strange phraseology) of other systems of law, were it only in a mere practical point of view:

1°. With a view to practice, or to the administration of

* Von Savigny, Beruf, etc., Hayward's Translation, p. 165.

† "Lord Hale often said, the true grounds and reasons of law were so well delivered in the (Roman) Digests, that a man could never understand law as a science so well as by seeking it there, and therefore lamented much that it was so little studied in England."—*Burnet's Life*, p. 7.

‡ Blackstone recommends the study of the Law of Nature, and of the Roman Law, in connection with the study of the particular grounds of our own. By Law of Nature, etc, he seems to mean the very study which I am now commending.

justice in those of our foreign dependencies wherein foreign systems of law more or less obtain. 2°. With a view to the systems of law founded on the Roman directly, or through the Canon or the Roman, which even at home have an application to certain classes of objects. 3°. With a view to questions arising incidentally, even in the Courts which administer indigenous law. 4°. With a view to the questions in the way of appeal coming before the Privy Council: A Court which is bound to decide questions arising out of numerous systems, without the possibility of judges or advocates having any specific knowledge of them: an evil for which a familiarity with the general principles of law on the part of the Court and advocates is the only conceivable palliative.

For, certainly, a man familiar with such principles, as detached from any particular systems, and accustomed to seize analogies, will be less puzzled with Mahommedan or Hindoo institutions, than if he knew them only *in concreto*, as they are in his own system; nor would he be quite so inclined to bend every Hindoo institution to the model of his own.

And (secondly) without some familiarity with foreign systems, no lawyer can or will appreciate accurately the defects or merits of his own.

And as a well-grounded knowledge of the science whose uses I am endeavouring to demonstrate, would facilitate to the student the acquisition of the English Law, so would it enable him to apprehend, with comparative ease and rapidity, almost any of the foreign systems to which he might direct his attention. So numerous, as I have said, are the principles common to systems of law, that a lawyer who has mastered the law which obtains in his own country, has mastered implicitly most of the substance of the law which obtains in any other community. So that the difficulty with which a lawyer, versed in the law of his own country, apprehends the law of another, is rather the result of differences

between the terms of the systems, than of substantial or real differences between their maxims and rules.

Now the obstacle to the apprehension of foreign systems which is opposed by their technical language, might in part be obviated or lightened to the student of General Jurisprudence, if the science were expounded to him competently, in the method which I shall endeavour to observe. If the exposition of the science were made agreeably to that method, it would explain incidentally the leading terms, as well as the leading principles, of the Roman or Civil Law. And if the student were possessed of those terms, and were also grounded thoroughly in the law of his own country, he would master with little difficulty the substance of the Roman system, and of any of the modern systems which are mainly derivatives from the Roman.

It has, I perceive, been maintained by some able and distinguished persons, that the jurisdiction of the Ecclesiastical Courts ought to be extended, in order that the ecclesiastical bar may not be extinguished, and that a sufficient supply of Civilians may be secured to the country.

The importance of securing the existence of a body of lawyers, with a somewhat extensive knowledge of the Civil Law, is not to be disputed. Questions arise incidentally in all our tribunals, on systems of foreign law, which are mainly founded on the Civil. The law obtaining in some of our colonies is principally derived from the same original. And questions arising directly out of colonial law, are brought before the Privy Council in the way of appeal. In order that these various questions may be justly decided, and in order that the law of these colonies may be duly administered, the existence of a body of English lawyers, with a somewhat extensive knowledge of the Civil Law, is manifestly requisite.

But I think it will be questioned by all who are versed in the Civil Law, whether a well-grounded study of the principles of the Law of England, of the *rationale* of law

in general, and of the leading principles and terms of the Roman system itself, be not a surer road to the acquisition of this knowledge, than the study of Ecclesiastical Law, or practice at the ecclesiastical bar.

Before I proceed further, it will be proper that I should describe what is, in my opinion, the education necessary to form a Lawyer.

Training of a Lawyer.

In order to the formation of a theoretico-practical lawyer, extensively versed in law as a science, and in the sciences related to law—such a man as were alone capable of advancing the science, and of conceiving sound legislative reforms—he must begin early to attend to these studies, and must be satisfied with a limited attention to other sciences.

The languages of classical antiquity are almost indispensable helps to all sound acquirements in Politics, Jurisprudence, or any of the Moral Sciences. They are also requisite for the formation of those elevated sentiments, and that rectitude of judgment and taste, which are inseparably connected with them. These languages may be acquired, and in fact are acquired, when well acquired, in early youth.

But with regard to mathematics, (except in as far as the methods of investigation and proof are concerned, and which would form a branch of a well-conceived course of logic,) I cannot see why men intended for law, or for public life, should study them: or why any men should study them, who have not a peculiar vocation to them, or to some science or art in which they are extensively applicable. To all other men, the advantages derivable from them, as a gymnastic to the mind, might be derived (at least in a great measure) from a well-conceived course of logic: into which, indeed, so much of mathematics as would suffice to give those advantages, would naturally enter.

Logic is a necessary preparation to the study of the moral sciences, where the ambiguity of the terms (especially

that which consists in their varying extension), the number of collective names (apt to be confounded with existences), and the elliptical form in which the reasoning is expressed, render a previous familiarity with the nature of terms and the process of reasoning absolutely necessary. In pure mathematics, and in the sciences to which these are largely applied, a previous acquaintance with the nature of induction, generalization and reasoning may not be so necessary; because the terms are definite, the premisses few and formally introduced, and the consequences deduced at length. But to those who have not time to discipline their minds by this most perfect exemplification of these processes, a previous acquaintance with logic is absolutely necessary. Indeed, considering the sort of difficulties which beset moral disquisitions, logic is a better preparation than the mathematics or the physical sciences; which are not the theory of these mental processes, but merely exemplifications of them.

With regard to lawyers in particular, it may be remarked, that the study of the *rationale* of law is as well (or nearly as well) fitted as that of mathematics, to exercise the mind to the mere process of deduction from given hypotheses. This was the opinion of Leibnitz: no mean judge of the relative values of the two sciences, in this respect. Speaking of the Roman Lawyers, he says, "Digestorum opus (vel potius auctorum, unde excerpta sunt, labores) admiror; nec quidquam vidi, sive rationum acumen, sive dicendi nervos spectes, quod magis accedat ad Mathematicorum laudem. Mira est vis consequentiarum, certatque ponderi subtilitas."*

* Leibnitz, Epist. ad Kestnerum. And again, in the same epistle; "Dixi sæpiùs, post scripta Geometrarum, nihil extare, quod vi ac subtilitate cum Romanorum jurisconsultorum scriptis comparari possit, tantum nervi inest, tantum profunditatis. . . . Nec uspiam juris naturalis præclare exculti uberiora vestigia deprehendas. Et ubi ab eo recessum est, sive ob formularum ductus, sive ex majorum traditis, sive ob leges novas, ipsæ consequentiæ ex nova hypothesi æternis rectæ rationis dictaminibus addita, mirabili ingenio, nec minore firmitate diducuntur. Nec tam sæpe à ratione abitur quam vulgo videtur."

And with regard to an accurate and a ready perception of analogies, and the process of inference founded on analogy ("argumentatio per analogiam," or "analogica")—the basis of all just inferences with regard to mere matter of fact and existence,—the study of law (if rationally pursued) is, I should think, better than that of mathematics, or of any of the physical sciences in which mathematics are extensively applicable. For example, the process of analogical inference in the application of law: the process of analogical consequence from existing law, by which much of law is built out: analogical inferences with reference to the consideration of expediency on which it is built: the principles of judicial evidence, with the judgments formed upon evidence in the course of practice: all these show that no study can so form the mind to reason justly and readily from analogy as that of law. And, accordingly, it is matter of common remark, that lawyers are the best judges of evidence with regard to matter of fact or existence.

And even admitting that, as a gymnastic, mathematics may be somewhat superior to law, still it is better that lawyers, and young men destined for public life, should not affect to know them extensively; but (having acquired the classics, and gone through a course of logic,) should, as early as possible, bend their attention, strenuously and almost exclusively, to General Jurisprudence, Legislation, and all the sciences related to these, which tend more directly to fit them for their profession, or for practical politics.

By the former, they are merely exercising (with reference to their callings) the mental powers. By the latter, they are at once exercising the mental powers, and making the very acquisitions without which they are not adequately fitted to exercise their callings. If I want to go to York on foot, I may acquire the swiftness and endurance which would help me to my goal, by preparatory walks on the road to Exeter. But by setting out at the commencement for York, I am at once acquiring swiftness and endurance,

and making a progress (during the acquisition) to the point which I am specially aiming to reach.

These remarks will not apply to men who are gifted with such velocity and such reach of apprehension, that they may aim safely at universality. They merely apply to men whose acquisitions are got by laborious attention: the only way in which, to my apprehension, they are to be got. These must content themselves with moderate acquisitions, out of the domain of the sciences bearing directly on their callings (enough to prevent bigotry), and must begin early to master those sciences. I am sorry it is so. For nothing would give me greater pleasure than extensive knowledge; especially of the strict sciences. But (speaking generally) he who would know anything well, must resolve to be ignorant of many things.

Necessity for a Law Faculty.

And here I must add that, in order to enable young men preparing for the profession, to lay a solid basis for the acquisition (in the office of a practitioner) of practical skill, and for subsequent successful practice, an institution, like the Law Faculty in the best of the foreign universities, seems to be requisite: an institution in which the general principles of jurisprudence and legislation (the two including ethics generally), international law, the history of the English law (with outlines of the Roman, Canon, and Feudal, as its three principal sources), and the actual English law (as divided into fit compartments), might be taught by competent instructors.

In such a school, young men, not intending to practise, but destined for public life, ('ad res gerendas nati,') might find instruction in the sciences which are requisite to legislators. Young men intended for administration (other than that of justice) would attend the law faculty; as, on the other hand, the men intended for law would attend the courses on the various political sciences, such as political economy, etc. For however great may be the utility of the study

of General Jurisprudence to lawyers generally; however absolute its necessity to lawyers entrusted with the business of Codification, its importance to men who are destined to take a part in the public business of the country is scarcely inferior.

It is extremely important that a large portion of the aristocracy, whose station and talents destine them to the patrician profession of practical politics, should at least be imbued with the *generalia* of law, and with sound views of legislation; should, so far as possible, descend into the detail, and even pass some years in practice.

If the houses of parliament abounded with laymen thus accomplished, the demand for legal reform would be more discriminating, and also more imperative; much bad and crude legislation would be avoided;—opposition to plausible projects not coming from a suspected quarter. This, in the innovating age before us, is no small matter. And though lawyers, fully acquainted with system, alone are good legislators, they need perhaps a check on professional prejudices, and even on sinister interests.

But such a check (and such an encouragement to good lawyers) would be found in a public of laymen versed in principles of law, and not in men ignorant of detail and practice.

It appears to me that London possesses peculiar advantages for such a Law Faculty. The instructors, even if not practising lawyers, would teach under the eye and control of practitioners: and hence would avoid many of the errors into which the German teachers of law, excellent as they are, naturally fall, in consequence of their not coming sufficiently into collision with practical men. The realities with which such men have to deal are the best correctives of any tendency to antiquarian trifling or wild philosophy, to which men of science might be prone. In England, theory would be moulded to practice.

Besides the direct advantages of such an institution many incidental ones would arise.

In the first place; A juridical literature worthy of the English bar.

Good legal treatises (and especially the most important of any, a good institutional treatise, philosophical, historical, and dogmatical, on the whole of the English law) can only be provided by men, or by combinations of men, thoroughly grounded and extensively and accurately read. Such books might be produced by a body of men conversant (from the duties of their office) with the subjects, but can hardly be expected from the men who now usually make them: viz. not lawyers of extensive knowledge, (whose practical avocations leave them no leisure for the purpose, although generally they are the only men fit for the task,) but young men, seeking notice, and who often want the knowledge they affect to impart.

Such men as I assume a law faculty to consist of, being accustomed to exposition, would also produce well-constructed and well-written books, as well as books containing the requisite information. Excellent books are produced by German Professors, in spite of their secluded habits; many of them being the guides of practitioners, or in great esteem with them (*e. g.* those of Professor Thibaut). In England, better might be expected, for the reason already assigned: viz. the constant view to practice forced upon writers by constant collision with practical men.

Secondly; Another effect of the establishment of a Law Faculty would be, the advancement of law and legislation as sciences, by a body of men specially devoted to teaching them as sciences; and able to offer useful suggestions for the improvement (in the way of systematizing or legislating) of actual law. For though enlightened practical lawyers are the best legislators, they are not perhaps so good originators (from want of leisure for abstraction) as such a body as I have imagined. And the exertions of such men,

either for the advancement of Jurisprudence and Legislation as sciences, or in the way of suggesting reforms in the existing law, might be expected to partake of the good sense and sobriety to which the presence and castigation of practitioners would naturally form them.

How far such an institution were practicable, I have not the means of determining.

There would be *one difficulty* (at first); that of getting a sufficient number of teachers competent to prove the *utility of learning* the sciences taught by them: masters of their respective sciences (so far as long and assiduous study could make them so); and, moreover, masters in the difficult art of perspicuous, discreet, and interesting exposition; an art very different from that of oratory, either in Parliament or at the Bar. Perhaps there is not in England a single man approaching the ideal of a good teacher of any of these sciences. But this difficulty would be obviated, in a few years, by the demand for such teachers; as it has been in countries in which similar institutions have been founded by the governments.

Another difficulty is, the general indifference, in this country, about such institutions, and the general incredulity as to their utility. But this indifference and incredulity are happily giving way (however slowly); and I am convinced that the importance of such institutions, with reference to the influence and honour of the legal profession, and to the good of the country (so much depending on the character of that profession) will, before many years are over, be generally felt and acknowledged.*

Encouraging symptoms have already appeared; and there is reason to hope from these beginnings, however feeble, that the government of the country or that the Inns of Court will ultimately provide for law students, and for young men destined to public life, the requisite means of an education fitting them for their high and important vocations.

* Written in the year 1834.

Having tried to state or suggest the subjects of the science of General Jurisprudence, with the manner in which those subjects ought to be expounded and exemplified; and having tried to demonstrate the uses which the study of the science might produce; I would briefly remark, that those uses are such as might result from the study, if the science were acquired by students of law, (professional or intended for public life,) with the requisite fulness and precision. But from mere attendance on a Course of Lectures, (however completely and correctly conceived, and however clearly expressed,) the science could not be acquired with that requisite fulness and precision. It could not be so acquired, though the lecturer brought to the task the extensive and exact knowledge, the powers of adequate and orderly conception, and the rare talent of clear exposition and apt illustration, which the successful performance of the task requires. For he could only explain adequately, or with an approach to adequacy, some certain parts in the whole series; filling up the gaps with mere indications of the necessary, but necessarily omitted links.

CODIFICATION AND LAW REFORM.

Probability of some attempts at Codification

Owing to the growing bulk and intricacy of the English Law (a bulk and intricacy which must go on increasing) it is most probable, nay it is almost certain, that before many years shall have elapsed, attempts will be made to systematize it, to simplify its structure, to reduce its bulk, and so to render it more accessible. Partially, such attempts have already been made, and are actually in project. And owing to the rapidity with which the accumulation of law goes on, to the incompatibility of many of its provisions with the changed circumstances of society, and to the turn for legal reform which public opinion is taking, it is most probable, nay it is almost certain, that the necessity for such changes will in a few years be felt or imagined, and that such changes will be attempted, skilfully or unskilfully. Of the expediency or inexpediency of such changes I presume not to give an opinion. I merely affirm that changes of the sort are in progress, and that greater changes of the same sort are to be hoped or feared.

Now whether such changes shall increase or diminish the evil, will depend upon the quality and the degree of the skill which shall be brought to the task. It will depend upon the number of competent workmen who can be brought to it. I shall therefore attempt to show what are the attainments requisite for such an undertaking.

First: with reference to the technical process of reconstructing the law, so as to reduce its bulk and to simplify its mechanism, it is clear that none but lawyers can be competent to it, that none but lawyers intimately acquainted with the system to be operated upon, can ever produce it with effect. Re-construction must be accomplished, if at all, by scientific Lawyers

But a mere acquaintance with the actual detail of the system, however extensive and accurate, will not suffice. It is necessary that those who are called to the task should possess that mastery of the system considered as an organic whole, which is the distinguishing characteristic of the consummate lawyer. It is pre-eminently necessary that they should possess clear and precise and ever-present conceptions of the fundamental principles and distinctions, and of the import of the leading expressions: That they should have constantly before their mind a map of the law as a whole, enabling it to subordinate the less general under the more general, to perceive the relations of the parts to one another, and thus to travel from general to particular and particular to general, and from a part to its relations to other parts, with readiness and ease: to subsume the particular under the general, and to analyse and translate the general into the particulars that it contains.

Nor can it be said that this talent is a mere idea. It has been possessed by the consummate lawyers of every age and nation. It was possessed by the Roman lawyers, and is indeed their pre-eminent merit Each seems to be possessed of the whole of the science; each seems to be capable of applying its principles with equal justness and certainty. Insomuch, that the Roman law, as formed by them, and as contained in the excerpts from the writings of which the Pandects constitute a part, though formed by the several labours of several men through a long series of ages, has all the coherence which commonly belongs to the work of one master mind.

It was possessed by Coke and Hale, between the former

of whom and the Roman lawyers the resemblance is striking. Though a chaos in form, the coherence of his mastery of the rules is complete.

Without the talent which I have endeavoured to describe, every attempt to systematize the law must, in my opinion, be abortive, or, at least, will fall short of the intended mark. All depends upon firm intention; upon an accurate conception of the leading principles and distinctions, of the subordination of the detail under those leading principles, and of the relations of those leading principles to one another. If these be accurately conceived, the faults in detail are easily corrected. If these be conceived confusedly, the faults are incurable.*

It is moreover requisite that a considerable number of men qualified as I have described should exist. For a Code cannot be the work of any one single mind. And if the work of several, it would be incoherent, though wrought out on a consistent plan, if not wrought out by men, each master of the system as an organic whole, and capable of working it out in detail consecutively. With such men, codification would doubtless be not only possible, but expedient; as is admitted by Von Savigny and by others of its bitterest opponents. And that the existence of such a number is not impossible, is shown by the Pandects.

The only men to originate and accomplish, or to guide and accomplish, legislative innovations, are enlightened practical lawyers: combining all that philosophy can yield, with all the indispensable supplements of philosophy which nothing but practice can impart. And this appears to be the meaning of Lord Bacon, though he mentions "viri civiles."† With the practical conclusion which he

* "Proderit autem hujus, quod nunc molior, consideratio ad demendum apud juri deditos contemtum philosophiæ, si videant, plurima sui juris loca sine hujus ductu inextricabilem labyrinthum fore."—*Leibnitz, Epist. ad Kestnerum.*

† "Qui de legibus scripserunt, omnes, vel tanquam philosophi, vel tanquam jurisconsulti, argumentum illud tractaverunt. Atque philosophi

deduces from this truth, I cannot agree. He seems to think that "viri civiles" (meaning apparently public men, or practical politicians) are the only fit legislators. No men less fit. And it is evident that the talents and acquirements which he supposes in such men (and for which he supposes them eminently called to the "heroical work" of legislation) are such as can only be found in enlightened practical lawyers: men who combine with an intimate knowledge of the existing system of law, a power and a liberal readiness to appreciate its merits and defects.

All attempts at Codification must be wrought out on one preconceived plan.

With regard to partial systematization, it is still more necessary that it should be done by men thus qualified.

Unless projectors are insane, every process of Codification is wrought out on a preconceived and previously stated plan of the whole system to be wrought upon. Though, therefore, the workers be not qualified previously in the manner I have described, the authors of the plan itself have, by the preparation of it, disciplined themselves to the task in some degree. And those who execute the plan in detail have someting of a guide in the plan itself. But in the case of bit-by-bit codification, the workmen have no plan before them of the whole law. And, unless by previous discipline, they have mastered the law to be operated upon as an organic whole, they are working on a part inextricably connected with the rest of the whole, without any perceptions of its relations to that unexplored, or at least undetermined, residue.

proponunt multa, dictu pulchra, sed ab usu remota. Jurisconsulti autem, suæ quisque patriæ legum, vel etiam Romanarum, aut Pontificiarum, placitis obnoxii et addicti, judicio sincero non utuntur, sed tanquam e vinculis sermocinantur. Certe cognitio ista ad viros civiles proprie spectat; qui optime norunt, quid ferat societas humana, quid salus populi, quid æquitas naturalis, quid gentium mores, quid rerumpublicarum formæ diversæ: ideoque possint de legibus, ex principiis et præceptis, tam æquitatis naturalis, quam politices, decernere."—*Bacon, De Augmentis Scientiarum, Preface to the De Fontibus Juris*, lib. viii. chap. iii.

It seems to me that codification carried on in this manner, (and which, I know not why, has gotten to itself the honourable name of practical,) is far more rash than any conceivable scheme of all-comprehensive codification; and is much more likely to engender the confusion which, it is commonly supposed, all-comprehensive codification must produce.

But the talents and knowledge requisite for such a task cannot be acquired by a merely empirical study of our own particular system, and by the mere habit of applying its rules to particular cases in the course of practice. It can only be acquired by scientific study; and the study which I am trying to commend, is of all others the best, with a view to the acquirement of it.

The study of General Jurisprudence (as shown above) has a tendency to form men qualified with the very talent which is most requisite for systematization (or simplification), which is the great condition "sine quâ non" of codification; and the want of which (as is admitted by the ablest of the opponents of codification) is the great difficulty in the way of it. It tends to fix in the mind a map of the law; so that all its acquisitions made empirically in the course of practice, take their appropriate places in a well-conceived system; instead of forming a chaotic aggregate of several unconnected and merely arbitrary rules. It tends to produce the faculty of perceiving at a glance the dependencies of the parts of his system, which, as I have said, is the peculiar and striking characteristic of the great and consummate lawyer.

Undoubtedly, a sufficiently accurate knowledge of detail can only be acquired by practice founded on previous study. But there is a wide difference between the practical tact which suffices for the mere application of rules to practice, or for the discovery of rules applicable to the given case, and the adequate and clear perception of the legal system as a whole, and of the relations of its parts, which is necessary to the

legislator: to him who is concerned, not with the mere application of rules, but with the reconstruction of such rules, their expression and arrangement, and with the numerous consequences with which any proposed innovation may be pregnant.

The very bulk of the system is an additional reason for a thoroughly systematic knowledge of it. Not only is an intimate acquaintance necessary with its rules as taken severally, but a perception of their relations to one another,—a map ever present to the mental eye, in which the dependencies of the parts, the apt place for every particular, and the consequence of the alteration of any on any of the rest, may be traced with certainty.

Mere theorists are apt to stick in barren generalities, or to take no correct measure of what is practicable under existing circumstances. Mere practitioners (however able as such) are not capable of subordinating details to generalities and of perceiving the extent of such generalities; and moreover, are incapable (from want of any standard of comparison) of appreciating the defects of their own system, and unwilling to amend them.

Theory and Practice are generally supposed to be incompatible. Though this is a gross error, there are doubtless some men to whom theory is more particularly useful; while there are others who, in the present state of opinion, would do well to avoid it. It may be feared that those who are not accustomed to abstract, may form hasty and ill-founded theories; and that those who have learned the principles of law in a general or abstract form, may only be perplexed by them when they come to the details of a positive system. Theory is a systematical statement of rules or propositions. Practice,—the application of any of these rules or propositions. Theory of what *is*, and theory of what *ought to be*, are perpetually confounded. Hence it is customary to oppose practice to *all* theory; because in many cases, theories of what *ought to be* are erro-

neous;—are not founded upon accurate observation; upon the accurate observations which the practitioner has the opportunity of making. Tidd's work is as much a theory *of what is*, as anything that ever bore the name.

Legislation must be accomplished by Scientific Lawyers.

Secondly, in respect of Legislation.

Innovations on the substance of existing law, can only be accomplished by lawyers,—whoever may conceive and suggest them. For every innovation on substance imports an innovation on form, though changes in the form are not, of necessity, changes in the substance. In respect, therefore, of changes in substance, in so far as they import corresponding changes in form and mechanism, all that I have said about total or partial codification or simplification, in the way of extirpation and substitution, is fully applicable.

With a view even to changes in substance, they ought to originate with lawyers intimately acquainted with the system to be wrought upon. Or, though others may suggest them, they ought to be submitted to the judgment of such lawyers before they are executed. None but they can determine how far such changes (though consonant to sound general principles of legislation) would accord with the actual circumstances in which the country is placed. Not to mention, that the end of many innovations is, in truth, often accomplished by existing law, or might be accomplished by some slight modification of it.*

But in order that even lawyers may be fitted for guiding legislation, it is necessary that they should be lawyers who not only possess the indispensable requisite of familiar acquaintance with the actual system, and with the actual position of the country, but who also are acquainted with the science of legislation; therefore, with general jurisprudence (including comparative jurisprudence) as an integral portion of legislation; and with all those sciences (such as

* Utility, in this respect, of the Court of Cassation.

political economy) from which the science of legislation, considered as the science of law as it should be, is in great measure derived.

Without these studies, they cannot and will not appreciate impartially and justly, the merits and demerits of the existing law, the wants of the country, the expediency or inexpediency of proposed innovations. Without them, they will evince the "morosa morum retentio." They will not evince the candid readiness to admit the faults of the existing system, and to lend their aid to amend them, which is necessary to make them looked up to by the public as the guides of legislation: a position which, with this readiness, (so indispensable to their guidance in all successful legislation,) they infallibly would attain: a position most honourable to the profession, and lending a dignity to all its members: a position which, with a view to the public good, it is necessary they should attain. It is not in the power of the profession to prevent a change, but it is in their power to take the lead and to determine the course of the inevitable movement: to discredit and crush (with the weight of influence founded on reason and public spirit) crude and mischievous innovations; to suggest useful innovations, and to carry useful innovations suggested by others into successful execution.

Sound legislative reforms (or sound innovations on the substance of the existing law) are not to be expected from the undisciplined sagacity of mere laymen: men who are neither acquainted, on the one hand, with the detail of the existing system, nor, on the other, with the general principles of law, with the science of legislation and with the sciences related to it: though suggestions from such men may be valuable. Nor can they be expected either from men who have acquired by mere solitary study such general principles, or from lawyers, however extensively acquainted with their own system, who have not qualified themselves in the manner described.

As is well remarked by Lord Bacon with regard to these two last-mentioned classes of men, in the passage just referred to in the "De Augmentis," mere speculators on law, however good their general principles, have no adequate knowledge of the actual system, or of the circumstances modifying the application of such principles, and which must be duly appreciated before they can be applied in practice; whilst merely practical lawyers, though never so accurately acquainted with the actual system, and with modifying circumstances, are so fettered by prejudices in favour of existing institutions, that they will not and cannot perceive and admit the expediency and necessity for the changes, which inevitable changes in the conditions of society are forcing upon them.

Thus, it appears clearly from the history of the English Law that the Equity of the Chancellors sprang, chiefly, from the illiberal adherence of the Common Law Courts to the defects of the law which they administered and of the procedure by which they enforced it. If they had successively adjusted their law and procedure to the successive demands for innovation which time incessantly engendered, the extraordinary jurisdiction of the Chancellors would have had no plausible ground; and the necessary and eternal distinction between strict Law and Equity would probably have been unknown to the law of the English nation, as well as to most of the systems obtaining in other communities.

Some enterprising judges in modern times have endeavoured, with more or less of success, to get to their own tribunals matters which Chancery had engrossed: [*E.g.*, Lord Mansfield, and even that stickler for things ancient, Lord Kenyon.*] But whether it were expedient to alter in this patchwork manner, now that the arbitrary line has been drawn, may be questioned.

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* Read *v.* Brookman; 3 Term Reports, 151.

I conclude by summing up the considerations on which the question of Codification turns.*

*Résumé of the question of codification.**

Such are the evils of judicial legislation, that it would seem that the expediency of a Code (or of a complete or exclusive body of statute law) will hardly admit of a doubt. Nor would it, provided that the chaos of judiciary law; and of the statute law stuck patchwise on the judiciary, could be superseded by a *good* Code. For when we contrast the chaos with a positive code, we must not contrast it with the very best of possible or conceivable codes, but with the code, which, under the given circumstances of the given community, would probably be the result of an attempt to codify.

Whoever has considered the difficulty of making a good statute, will not think lightly of the difficulty of making a code. To conceive distinctly the general purpose of a statute, to conceive distinctly the subordinate provisions through which its general purpose must be accomplished, and to express that general purpose and those subordinate provisions in perfectly adequate and not ambiguous language, is a business of extreme delicacy, and of extreme difficulty, though it is frequently tossed by legislators to inferior and incompetent workmen. I will venture to affirm, that what is commonly called the *technical* part of legislation, is incomparably more difficult than what may be styled the *ethical.* In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver.

Accordingly, statutes made with great deliberation, and by learned and judicious lawyers, have been expressed so obscurely, or have been constructed so unaptly, that decisions interpreting the sense of their provisions, or supplying and correcting their provisions *ex ratione legis*, have been of necessity heaped upon them by the Courts of Justice.

* What follows is extracted from Lecture XXXIX., Vol II. of Lectures on Jurisprudence.

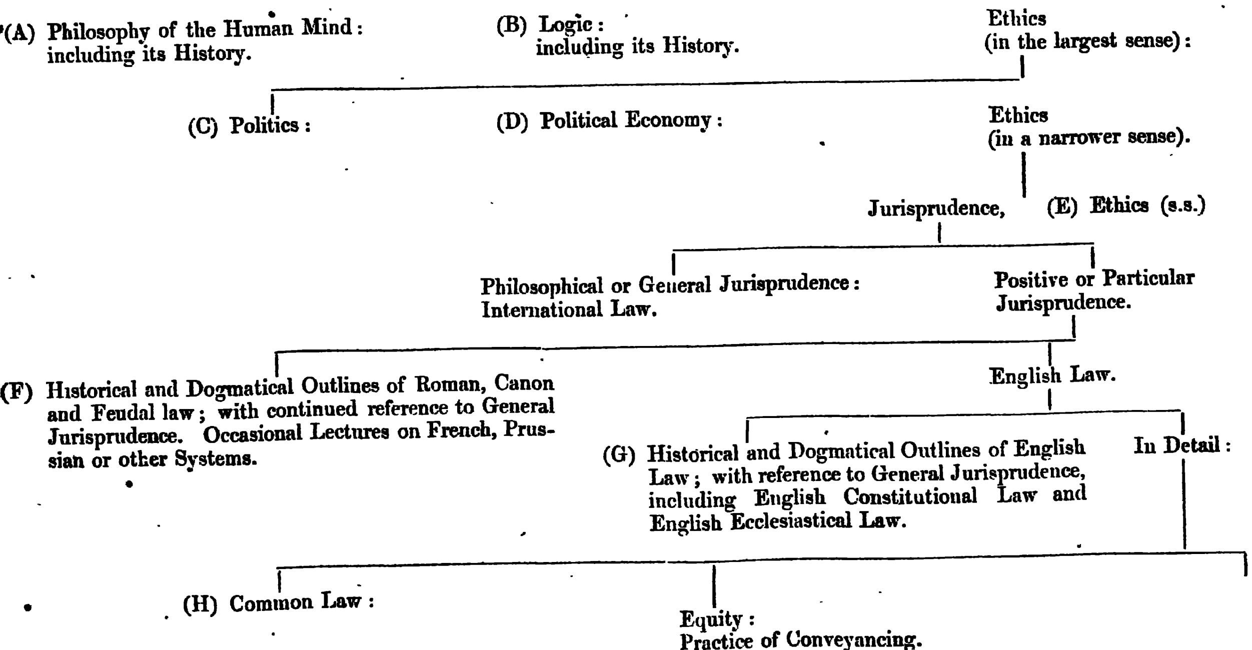
Such, for example, is the case with the Statute of Frauds; which was made by three of the wisest lawyers in the reign of Charles the Second: Sir M. Hale (if I remember aright) being one of them.

It follows from what I have premised, and will appear clearly from what I shall say hereafter, that the question of Codification is a question of time and place. Speaking in abstract (or without reference to the circumstances of a given community) there can be no doubt that a complete Code is better than a body of judiciary law: or is better than a body of law partly consisting of judiciary law, and partly of statute law stuck patchwise on a body of judiciary.

But taking the question in concrete (or with a view to the expediency of codification in this or that community) a doubt may arise. For here we must contrast the existing law (not with the *beau idéal* of possible codes, but) with that particular code which an attempt to codify would then and there engender. And that particular and practical question (as Herr von Savigny has rightly judged) will turn mainly on the answer that must be given to another: namely, Are there men, then and there, competent to the difficult task of successful codification? of producing a code, which, on the whole, would more than compensate the evil that must necessarily attend the change?

The vast difficulty of successful codification, no rational advocate of codification will deny or doubt. Its impossibility, none of its rational opponents will venture to affirm.

IDEA OF A COMPLETE LEGAL EDUCATION.



* I have not been able to discover to what these letters refer.—S. A.

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THE END.

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